Supreme Court U.S.
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No. 05-988

In The

Supreme Court of the United States

LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAII,

Petitioner,

v.

EARL F. ARAKAKI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state taxpayers have standing to challenge the actions of state government or state agencies that expend, or involve the use of, state taxpayer dollars, simply because they pay taxes to the state?

PARTIES TO THE PROCEEDINGS

The following fourteen persons were plaintiffs-appellants in the proceedings in the United States Court of Appeals for the Ninth Circuit, and, as to this petition, are the Respondents before this Court: EARL F. ARAKAKI, EVELYN C. ARAKAKI, EDWARD U. BUGARIN, SANDRA PUANANI BURGESS, PATRICIA A. CARROLL, ROBERT M. CHAPMAN, MICHAEL Y. GARCIA, TOBY M. KRAVET, JAMES I. KUROIWA, JR., FRANCES M. NICHOLS, DONNA MALIA SCAFF, JACK H. SCAFF, ALLEN H. TESHIMA, and THURSTON TWIGG-SMITH. These Respondents will be referred to in the remainder of this petition as "Plaintiffs."

LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAII, was a defendant-appellee in the Ninth Circuit, and is the **Petitioner** before this Court.

The following six state officials were defendants-appellees in the Ninth Circuit, and, while technically Respondents before this Court (having not joined in this petition because all claims against them were dismissed below[1]), support this petition: GEORGINA KAWAMOTO, in her official capacity as DIRECTOR OF THE DEPARTMENT OF BUDGET AND FINANCE, RUSS SAITO, in

[1] These six officials were sued to the extent their respective state departments transfer receipts from the use of ceded lands managed by their departments to the Office of Hawaiian Affairs. Because both the District Court and the Ninth Circuit ruled that plaintiffs had no standing (under either a state taxpayer or trust beneficiary theory) to challenge the transfer or use of such non-taxpayer monies (App. 25-32, 125-26), these officials have effectively been dismissed from the lawsuit.

PARTIES TO THE PROCEEDINGS – Continued

his official capacity as STATE COMPTROLLER and DIRECTOR OF THE DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES, PETER YOUNG, in his official capacity as CHAIRMAN OF THE BOARD OF LAND AND NATURAL RESOURCES, SANDRA LEE KUNIMOTO, in her official capacity as DIRECTOR OF THE DEPARTMENT OF AGRICULTURE, TED LIU, in his official capacity as DIRECTOR OF THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM, and RODNEY HARAGA, in his official capacity as DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION.[2]

The following nine state officials were defendants-appellees in the Ninth Circuit, and, while technically Respondents before this Court (having not joined in this petition because all claims against them were dismissed below), support this petition: MICAH KANE, Chairman, QUENTIN K. KAWANANAKOA, MAHINA MARTIN, COLIN KAALELE, TRISH MORIKAWA, MILTON PA, STUART HANCHETT, BILLIE BACLIG, and MALIA KAMAKA, in their official capacities as members of the Hawaiian Homes Commission.[3]

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[2] We note that the names of the various state officials, who are sued in their official capacities only, are the names of the *current* officeholders. The persons holding those offices have changed over the course of the litigation.

[3] *See* footnote 2. We also note that many of these commissioners were erroneously left out of the original caption to the Ninth Circuit's decision below (App. 1-2).

PARTIES TO THE PROCEEDINGS – Continued

The Petitioner, along with the just-listed fifteen state officials, will be referred to collectively in the remainder of this petition as "State Defendants."

The following nine officials were defendants-appellees in the Ninth Circuit, and, while technically Respondents before this Court (having not joined in this petition), are expected to file a response supporting this petition: HAUNANI APOLIONA, Chairperson, ROWENA AKANA, DONALD CATALUNA, LINDA DELA CRUZ, DANTE CARPENTER, COLETTE Y.P. MACHADO, BOYD P. MOSSMAN, OSWALD STENDER, and JOHN D. WAIHEE, IV, in their official capacities as trustees of the Office of Hawaiian Affairs.[4]

THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10, were defendants-appellees in the Ninth Circuit, and are, pursuant to Supreme Court Rule 12.6, automatically designated as Respondents before this Court.

STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, and ANTHONY SANG, SR., were defendant intervenors-appellees in the Ninth Circuit, and are, pursuant to Supreme Court Rule 12.6, automatically designated as Respondents before this Court.

HUI KAKO'O'AINA HO'OPULAPULA, BLOSSOM FEITEIRA, and DUTCH SAFFERY, were also defendant intervenors-appellees in the Ninth Circuit, and are,

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[4] *See* footnote 2.

PARTIES TO THE PROCEEDINGS – Continued

pursuant to Supreme Court Rule 12.6, automatically designated as Respondents before this Court.[5]

[5] We note that these intervenors were erroneously left out of the original caption to the Ninth Circuit's decision below (App. 1-2).

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OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion (App. 1) is reported at 423 F.3d 954. The District Court's opinions are reported at 198 F.Supp.2d 1165 (App. 140), 299 F.Supp.2d 1090 (App. 111), 299 F.Supp.2d 1107 (App. 97), 299 F.Supp.2d 1114 (App. 69), 299 F.Supp.2d 1129 (App. 65), and 305 F.Supp.2d 1161 (App. 42).[6]

The Ninth Circuit's order denying *plaintiffs'* petition for panel rehearing or rehearing en banc is reprinted at App. 169. The Ninth Circuit's order granting State Defendants' motion for a stay of mandate pending the filing of a petition for writ of certiorari is reprinted at App. 193.

JURISDICTION

(i) The opinion of the United States Court of Appeals for the Ninth Circuit, which this petition seeks to have reviewed, was entered on August 31, 2005. *See* 423 F.3d 954 (9th Cir. 2005) (App. 1). This opinion will hereinafter be referred to as "Ninth Circuit's decision" or "Ninth Circuit's ruling."

ii) The Order of the Ninth Circuit denying Plaintiffs' (who are *Respondents* in this Court) petition for panel rehearing and petition for rehearing en banc was filed November 4, 2005 (App. 169). No extension of time to file this petition for a writ of certiorari was sought.

iii) This is *not* a conditional cross-petition.

[6] The District Court issued numerous unpublished procedural orders that are not relevant or helpful to this Court's consideration of this petition, and thus are not listed herein.

iv) This Court has jurisdiction to review on a writ of certiorari the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254(1).

v) Because the United States and officials of the State of Hawaii are parties to this case, no notification under Supreme Court Rule 29.4(b) or (c) was required or made.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The *constitutional* provisions involved in this case are 1) U.S. Constitution: Article III, Section 2 [Judicial Power extends to "Cases" or "Controversies"] (App. 172); Amendment XIV, Section 1 ["Equal Protection Clause"] (App. 172), and 2) Constitution of the State of Hawaii: Article XII, Sections 4 through 6 (App. 180-82).[7]

The *statutory* provisions involved in this case are the following: 1) The Admission Act, Sections 5(b) and 5(f) [73 Stat. 4] (App. 173-74),[8] 2) the definition of "[n]ative Hawaiian" provided in the Hawaiian Homes Commission Act, § 201, 42 Stat. 108 (1921) (App. 175),[9] and 2) Hawaii Revised

[7] Sections 1 through 3 of Article XII (App. 177-80) – relating to the Hawaiian Homes Commission Act (HHCA) – although originally relevant to the case, are no longer directly relevant given that the portions of Plaintiffs' suit involving the HHCA have been dismissed. *See* footnote 14, infra.

[8] Section 4 of the Admission Act (App. 173) – relating to the Hawaiian Homes Commission Act – is no longer directly relevant. *See* footnote 7, supra.

[9] The remainder of the Hawaiian Homes Commission Act (e.g., App. 175-77) – originally a federal law, 42 Stat. 108; but now a law of

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Statutes (HRS) Sections 10-1, 10-2, 10-3, 10-4, 10-5, 10-6, 10-7, 10-10, 10-13, 10-13.5, 10-16 (App. 182-92).

It should be noted that most of the above provisions are relevant principally, if not exclusively, to the *underlying merits of the Equal Protection challenge*, and *not* to the issues of justiciability – involving the validity of state taxpayer standing – upon which certiorari review is sought in this petition. However, the provisions are nevertheless reproduced here to assist this Court in understanding the context in which the state taxpayer standing issues arise.

STATEMENT OF THE CASE

1. Plaintiffs filed their lawsuit in the United States District Court for the District of Hawaii on March 4, 2002, seeking declaratory and injunctive relief to stop longstanding programs provided by the State of Hawaii designed to better the conditions of indigenous Native Hawaiians and/or native Hawaiians,[10] including the homestead program created by the 1921 Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108 (1921), and programs of the Office of Hawaiian Affairs ("OHA"), HRS Chapter 10, which office was established in 1978. *See*

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the State of Hawaii; *see* Haw. Const. Art. XII, Sections 1-3; Admission Act Section 4 – is no longer directly relevant. *See* footnote 7, supra.

[10] Unless the context suggests otherwise, this brief uses the terms "**Hawaiian**" or "**Native Hawaiian**" to refer to all descendants, regardless of blood quantum, of the indigenous people who inhabited the Hawaiian Islands prior to 1778. The term "**native Hawaiian**" (with lower case "n") refers to the subset of Native Hawaiians with 50% or more Hawaiian blood quantum. *See* HHCA § 201 (App. 175).

Hawaii Constitution Article XII, Sections 1-6 (App. 177-82).

2. In order to rehabilitate the native Hawaiian population of Hawaii that had been suffering severe social and economic decline, and drastic reductions in their native population – due to cultural displacement, political disempowerment, foreign diseases, and other external influences – Congress in 1921 enacted the HHCA. It provided that a portion of the ceded lands – lands formerly belonging to the government and monarch of the Kingdom of Hawaii, but ceded by the Republic of Hawaii to the United States upon the overthrow of the Kingdom and its subsequent annexation – be used to provide homesteads (at a nominal lease rent) for *n*ative Hawaiians; i.e., Hawaiians with 50% or more Native Hawaiian blood. *See* HHCA §§ 201, 203, 204, 207, 208 (App. 175-77). The Department of Hawaiian Home Lands ("DHHL"), headed by the Hawaiian Homes Commission, is the Hawaii state agency that administers the HHCA. *See* HHCA §§ 202, 204 (App. 175, 176).[11]

3. In 1959, Congress admitted Hawaii as a state, gave title to the ceded lands to the State of Hawaii, and directed that the ceded lands (and the income and proceeds from them) be held by the State as a public trust for five purposes, including "the betterment of the condition of native Hawaiians" (with "native Hawaiians" having the definition given the term in the HHCA, i.e., persons of 50% or more Hawaiian blood quantum; *see* footnote 10, supra). Admission Act § 5(f) (App. 174).

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[11] Plaintiffs' attack on the HHCA, however, has been dismissed. *See* footnote 14, infra (second paragraph).

In 1978 the people of Hawaii amended the Hawaii Constitution to create an Office of Hawaiian Affairs (OHA), whose mission was to better the conditions of Native Hawaiians and native Hawaiians. *See* HRS Chapter 10 (App. 182-92). OHA is financed primarily through a portion of the receipts from the use of the ceded lands. State taxpayer dollars provide a proportionately much smaller contribution to OHA's operations. OHA develops and coordinates cultural, economic, educational, political, and other initiatives to better the conditions of Hawaiians and native Hawaiians, including making grants and giving other assistance to organizations that provide a variety of social and educational services, and also issuing small business loans and related assistance.

4. Plaintiffs sought declaratory and injunctive relief against the above HHCA and OHA programs on the theory that the programs' qualifications limiting participation to Native Hawaiians or native Hawaiians[12] violate the Equal Protection Clause of the United States Constitution by discriminating against non-Hawaiians.

Plaintiffs, however, did not allege that any of them applied for, otherwise sought, or were even interested in, participation in those programs. Plaintiffs instead based their Article III standing on the mere fact that they paid state taxes to the State of Hawaii, and on their claim that these programs were financed, at least in part, by state taxpayer monies.[13] State Defendants (including Petitioner

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[12] Not all of the programs, however, restrict participation to Native or native Hawaiians.

[13] Plaintiffs also urged an alternative theory of standing based upon their alleged trust beneficiary status. However, this theory was properly rejected by the Ninth Circuit Court of Appeals (as well as the

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herein), citing to Justice Kennedy's opinion in *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613-14 (1989) (plurality), contended below that Plaintiffs' entire suit should be dismissed because plaintiffs' status as state taxpayers was insufficient to satisfy the standing requirements of Article III.

5. State Defendants also urged, in the alternative, that even if plaintiffs' mere status as state taxpayers were sufficient under Article III, *prudential* standing concerns precluded federal court jurisdiction over a case in which the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens.

6. Both the District Court and the Ninth Circuit, however, granted plaintiffs standing for some of their claims based upon plaintiffs' mere state taxpayer status.[14]

District Court). *See Arakaki*, 423 F.3d at 963-65, 972-73 (App. 11-15), and is *not* the subject of this petition.

[14] Both the Ninth Circuit and the District Court nevertheless threw out the *non-taxpayer-dollars* portion of plaintiffs' suit regarding OHA; i.e., that portion seeking to enjoin the State's providing to OHA those funds (and/or the portion seeking to enjoin OHA's use of those funds for Hawaiian programs) *that did not come from state taxpayer dollars, but from revenues generated on the ceded lands*, or revenue from settlements funded by bonds issued by the State. *See* 423 F.3d at 970-72 (App. 25-31); 299 F.Supp.2d at 1099-1101 (App. 125-27).

The Ninth Circuit and the District Court also dismissed the *entire* suit as to *the HHCA*, throwing out not just the attack on DHHL operations to the extent financed by non-taxpayer land revenues, but also the attack on DHHL operations actually financed by state taxpayer dollars. *See* 423 F.3d at 965-67 (App. 16-19); 299 F. Supp.2d at 1125-27 (2003) (App. 89-93). Both courts did so based upon a *different* no-standing theory (rooted in the United States being an indispensable party), which relied upon the earlier Ninth Circuit decision of *Carroll v. Nakatani*, 342 F. 3d 934 (9th Cir. 2003). This dismissal of the entire suit

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The Ninth Circuit three-judge panel, however, rejected State Defendants' no-standing argument only because it felt bound by a prior Ninth Circuit decision, *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (1984), which the panel, *not* sitting *en banc*, believed it could not overturn. *See Arakaki*, 423 F.2d at 967-69 (App. 19-24). *Hoohuli* had granted the plaintiffs in that case standing to challenge the constitutionality of the Hawaii state government's appropriating and expending state taxpayer money (from the state's general fund) for the benefit of Hawaiians, based simply on the fact that plaintiffs paid taxes to the state. *See Hoohuli*, 741 F.2d at 1180-81.

7. The *District* Court, despite authorizing state taxpayer standing to challenge the State's funding of OHA (and OHA's use of those funds) to the extent those funds came directly from state taxpayer monies, had ultimately dismissed those claims under the political question doctrine. 305 F.Supp.2d at 1164-74 (D. Haw. 2004) (App. 44-64). The Ninth Circuit, however, reversed the political question ruling[15] and remanded to the District Court to proceed with the suit as to the State's funding of OHA's activities with state taxpayer monies (and OHA's use of those monies in turn for Hawaiians). 423 F.3d at 973-76 (App. 32-38).

8. Petitioner asserts that the state taxpayer standing basis for the claims remaining in this suit is improper, and contrary to numerous federal courts of

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as to the HHCA is, of course, *not* challenged by, nor the subject of, this petition.

[15] This petition does *not* challenge the Ninth Circuit's rejection of the political question doctrine's applicability.

appeals decisions, Justice Kennedy's *ASARCO* opinion (joined by Justices Stevens, Scalia and the late Chief Justice Rehnquist), and Justice Breyer's *Nike* opinion[16] (joined by Justice O'Connor). And because a favorable ruling by the Supreme Court to that effect would terminate the entire lawsuit and avoid unnecessary and costly proceedings in the district court, avoid disruption of OHA programs that help the State fulfill its special relationship with Native Hawaiians, and prevent interference with fundamental federalism and separation of powers concerns, State Defendants moved the Ninth Circuit to stay the issuance of its mandate pending the filing of a writ of certiorari. The Ninth Circuit, which will not grant a stay unless the certiorari petition "would present a *substantial question* and that there is good cause for a stay," FRAP 41(d)(2)(A), granted the motion, staying the mandate until final disposition of the petition by the Supreme Court. (App. 193-95).

9. Plaintiffs predicated their jurisdiction in the District Court on 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343(3) & (4) (civil rights), and 28 U.S.C. § 2201 & 2202 (declaratory judgment).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's ruling, which simply followed its prior *Hoohuli* state taxpayer standing decision, meets two *separate* and *independent* bases for certiorari review. First, as explained in detail in subsection I below, it raises "an important question of federal law that has not been, but

[16] *See Nike, Inc. v. Kasky*, 539 U.S. 654, 669 (2003).

should be, settled by [the United States Supreme] Court." Sup. Ct. R. 10(c). However, although not settled by a single majority opinion of this Court, six of this Court's present and former justices have taken a position contrary to the Ninth Circuit's state taxpayer doctrine, and thus it could be said, in the alternative, that the Ninth Circuit's ruling below "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). *See* discussion infra at 15-16. In short, this case satisfies at least one of the alternative criteria in Sup. Ct. R. 10(c) for certiorari.

Second, the Ninth Circuit's ruling constitutes "a decision in *conflict* with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Indeed, the ruling conflicts with decisions of at least five other circuits. *See* subsection II, infra. And Petitioner is unable to find a single other circuit that follows the Ninth Circuit's broad state taxpayer standing doctrine adopted in *Hoohuli*, and reaffirmed in the case at bar.

I. The issue of whether state taxpayers have standing to challenge the actions of state government simply because they pay taxes to the state presents an important question of federal law that has not been, but should be, settled by the United States Supreme Court.

The question of whether state taxpayers can challenge in federal court the actions of state government or state agencies simply because they pay taxes to the state, is surely an *important* federal issue as it goes to the heart of Article III's case or controversy requirement, governing the fundamental authority of federal courts to decide

cases. Allowing every single state taxpayer to challenge state laws in federal court, when that taxpayer is not directly or uniquely injured by those laws – as is the case here, where plaintiffs do *not* allege that they even desire, much less seek, any of the OHA benefits limited to Native Hawaiians or native Hawaiians – violates Article III's limited grant of jurisdiction to the federal courts to decide only *real* cases and controversies. Because, as explained further below, the state taxpayers in cases such as this one are not affected in any meaningful way by the state laws they challenge, federal court jurisdiction over such suits violates the well-accepted doctrine that federal courts not decide abstract questions of law. As stated by this Court in *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983):

> Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. . . . Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

The state taxpayer injury in cases like the one at bar does not exist *at all*, or is certainly not "real" or "immediate," but rather at best "abstract" and "conjectural," for as Justice Kennedy explained in his *ASARCO* opinion for himself, Justices Stevens and Scalia, and the late Chief Justice Rehnquist:

> [S]uits premised on federal taxpayer status are not cognizable in the federal courts because a

> taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain that no basis is afforded for [judicial intervention]." *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). . . . [W]e have likened *state* taxpayers to *federal* taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of "direct injury," pecuniary or otherwise. *Doremus*.

ASARCO, Inc. v. Kadish, 490 U.S. 605, 613-14 (1989) (Kennedy, J., opinion).

And, as further explained in *ASARCO*, 490 U.S. at 614:

> Even if [the suit would yield money for the school trust fund], it is pure speculation whether the lawsuit would result in any actual tax relief for respondents. If they were to prevail, it is conceivable that more money might be devoted to education [rather than taxes being cut]. . . . The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is "remote, fluctuating and uncertain."

For these reasons, therefore, absent a demonstration of any personal interest in receiving the benefits offered by the programs for Native or native Hawaiians, plaintiffs' state taxpayer status alone (a status they share with virtually the entire adult population of the state) does not provide them with real injury, and thus Article III standing to challenge those programs.

State taxpayer suits also severely distort the balance of power between the federal government and the states (i.e., federalism), and intrude upon separation of powers concerns. A federal court's exercise of jurisdiction in state taxpayer suits like this one would violate federalism principles because a *federal* court would be interfering with the enforcement of *state* laws even though no plaintiff has been directly and uniquely injured by the challenged law. *See Tarsney v. O'Keefe*, 225 F.3d 929, 938 (8th Cir. 2000) ("Allowing state taxpayers to litigate claims of unconstitutional expenditures without having to show a direct injury would 'seriously undermine . . . federalism.'"); *Colorado Taxpayers Union v. Romer*, 963 F.2d 1394, 1402-03 (10th Cir. 1992) (denying state taxpayer standing "comports with notions of federalism"); *Taub v. Commonwealth of Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988) (rejecting state taxpayer standing in part because of "[c]onsiderations of federalism"); *cf. City of Los Angeles v. Lyons*, 461 U.S. at 112 ("recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers [administering state laws] in the absence of irreparable injury which is both great and immediate."); *Rizzo v. Goode*, 423 U.S. 362, 380 (1976) ("principles of federalism . . . have applicability where injunctive relief is sought . . . against those in charge of an executive branch of an agency of state or local governments.").

In addition, state taxpayer suits also violate *separation of powers* concerns because a *judicial* branch (albeit federal) would be unnecessarily interfering with state *legislative* and state *constitutional* enactments, even though no one has been truly injured, and where the political branches can step in instead. *Cf. United States v.*

Richardson, 418 U.S. 166, 189 (1974) (Powell, J., concurring) ("taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government."); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474 (1982) ("Proper regard for the complex nature of our constitutional structure requires . . . that the Judicial Branch . . . [not] hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury"); *Taub*, 842 F.2d at 919 (6th Cir.) ("restrictions on . . . taxpayer standing prevent unwarranted intrusions by the courts into matters entrusted to the legislative and executive branches"); *Colorado Taxpayers*, 963 F.2d at 1402 (10th Cir.) (same).

On a practical level, the permissibility of state taxpayer suits affects whether hundreds of cases brought in federal courts each year may proceed or must be dismissed; disallowing them will thus save substantial federal judicial resources, and prevent needless interference with the operations of state government and the administration of state laws. Rejection of state taxpayer standing will also ensure that those litigating important constitutional (or other) legal issues have a direct, unique, and "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The importance of the issue of state taxpayer standing is confirmed by the fact that this Court just recently *sua sponte* asked that the parties in a case granted certiorari on a Commerce Clause issue also address the question of standing in a case in which many of the plaintiffs are mere state taxpayers. *See DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 36 (2005) ("In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether respondents have standing to challenge Ohio's investment tax credit"); *Wilkins v. Cuno*, 126 S. Ct. 26 (2005) (same).[17]

Finally, the question of state taxpayer standing has *not* been settled by the United States Supreme Court. As the Ninth Circuit panel in this case noted:

> Whether Justice Kennedy's opinion is dictum or not, that portion of his opinion on state taxpayer standing is not the opinion of the Supreme Court. It may carry persuasive value to a court that has not previously ruled on state taxpayer standing, but an opinion from an evenly divided Court is not a precedentially binding intervening opinion of the Court. We therefore may not hold our prior opinion in *Hoohuli* overruled by an opinion of four Justices, even if we thought it persuasive, without obtaining en banc review.

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[17] That this Court may ultimately address the issue of state taxpayer standing in a case already pending before it, of course, makes it *more* appropriate that certiorari be granted in the case at bar. For if this Court in the *Cuno* case ultimately decides to follow Justice Kennedy's *ASARCO* position, or otherwise rejects or limits state taxpayer standing, this Court could simply grant certiorari in the case at bar, vacate the decision below, and remand for reconsideration in light of the *Cuno* ruling.

Arakaki, 423 F.3d at 968-69 (App. 23) (citations omitted). Therefore, the criterion of Sup. Ct. R. 10(c) – that the important question of federal law has "not been, but should be, settled by" the Supreme Court – is easily satisfied. Moreover, the unsettled nature of the issue itself creates its own set of problems.[16]

Alternatively, one can view Justice Kennedy's four-justice *ASARCO* opinion nevertheless as a "relevant decision[] of [the Supreme] Court," Sup. Ct. R. 10(c), especially given that the other four-justice opinion by Justice *Brennan* concurring in the judgment took issue more with Justice Kennedy's *other* standing ruling (regarding the teachers' association's standing), rather than Justice Kennedy's *state taxpayer* standing ruling. 490 U.S. at 633. Therefore, in the alternative, the Ninth Circuit's decision, by conflicting with Justice Kennedy's opinion, does "conflict[] with [a] relevant decision[] of this Court." Sup. Ct. R. 10(c).

Moreover, at least *six* of this Court's current and former members disagree with the Ninth Circuit's state taxpayer standing doctrine. In addition to current Justices Kennedy, Stevens, and Scalia, and the late Chief Justice Rehnquist (who each signed on to Justice Kennedy's opinion in *ASARCO*), Justice Breyer, joined by Justice O'Connor, also expressed the view that "state taxpayers . . . ordinarily lack federal standing." *Nike, Inc. v. Kasky*,

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[16] *See* Staudt, "Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine," 52 Emory L. J. 771, 836-37 (2003) (lack of guidance on state taxpayer standing issue has led to general confusion among, and within, the circuits, leading to disparate results, and unequal treatment, as well as a waste of private and judicial resources, and disrespect for federal judges as unprincipled decision-makers).

539 U.S. 654, 669 (2003) (mem.). Given that six of this Court's present and former members have thus expressed written disagreement with the doctrine propounded by the Ninth Circuit, it is even more reasonable to claim that the Ninth Circuit's decision "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Either way, however, the criteria of Sup. Ct. R. 10(c) are satisfied, whether the panel decided an issue that has not been, but should be, decided by the Supreme Court, or decided the issue in a way that conflicts with decisions of the Supreme Court.

II. The Ninth Circuit's ruling allowing state taxpayer standing conflicts with the decisions of at least five other circuits.

The other separate and independent criterion for certiorari – that "a United States court of appeals has entered a decision in *conflict* with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a) – is also easily satisfied here. Indeed, the panel's decision conflicts with the decisions of at least *five* other circuits, which have rejected the broad state taxpayer standing doctrine the Ninth Circuit applied below. These other circuits, in direct contradiction to the Ninth, do not allow plaintiffs to challenge state actions (expending taxpayer monies) simply because they pay taxes to the state, where the state actions do not otherwise impact the plaintiffs.

These five circuits, by adopting instead the position espoused in Justice Kennedy's *ASARCO* opinion (either explicitly, or in effect), have repudiated general state taxpayer standing, and are thus in direct conflict with the Ninth Circuit's ruling in this case reaffirming *Hoohuli*'s broad state taxpayer standing doctrine. *See Bd. of Educ. v.*

New York State Teachers, 60 F.3d 106, 110-111 (**2nd** Cir. 1995) (citing Justice Kennedy's opinion in *ASARCO*, rejecting *Hoohuli* approach, and holding that "[s]tate taxpayers, like federal taxpayers, do not have standing to challenge the actions of state government simply because they pay taxes to the state"); *Henderson v. Stalder*, 287 F.3d 374, 379-80 (**5th** Cir. 2002) (citing Justice Kennedy's *ASARCO* opinion as controlling, and stating that "the state taxpayer plaintiffs have not alleged that the amount they pay to the State in the form of income taxes will increase because of the enactment" and thus their suit "at most, constitutes a generalized grievance common to all tax payers in the state"); *Taub v. Commonwealth of Kentucky*, 842 F.2d 912, 918-19 (**6th** Cir. 1988) (rejecting *Hoohuli* and holding that "requirements for federal taxpayer standing . . . control the issue of state taxpayer standing, at least in those cases where violation of the Establishment Clause is not alleged" and requiring a state taxpayer to "allege direct and palpable injury"); *Tarsney v. O'Keefe*, 225 F.3d 929, 936-38 (**8th** Cir. 2000) (rejecting state taxpayer Free Exercise challenge to state spending offensive to taxpayer's religious beliefs because a "taxpayer who was not" "direct[ly] injur[ed]" "by the allegedly unconstitutional expenditure would not have taxpayer standing to challenge the expenditure"); *Colorado Taxpayers v. Romer*, 963 F.3d 1394, 1401-03 (**10th** Cir. 1992) (rejecting *Hoohuli*, following Justice Kennedy's *ASARCO* opinion likening state taxpayers to federal taxpayers, and requiring that, outside the Establishment Clause area, a state taxpayer show "he has suffered a monetary loss due

to the allegedly unlawful activity's effect on his tax liability").[19]

Accordingly, the Ninth Circuit's position has been flatly rejected by at least *five* other circuits, and thus the ruling below easily satisfies the Rule 10(a) certiorari criterion of conflict with another circuit court's ruling on an important matter.[20]

III. Even if state taxpayers could satisfy the requirements of Article III, *prudential* concerns dictate dismissal of state taxpayer suits because the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens.

In addition, even if state taxpayer suits were somehow deemed sufficient to meet Article III's constitutional requirements, *prudential* standing concerns should bar federal court jurisdiction over state taxpayer lawsuits. As stated in *Warth v. Seldin*, 422 U.S. 490, 499 (1975):

> Apart from [the Article III] minimum constitutional mandate, this Court has recognized other [prudential] limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the

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[19] Furthermore, an additional circuit, in dicta, has cited Justice Kennedy's opinion in *ASARCO*, and stated that "*state* taxpayers lack a sufficiently personal interest to challenge laws of general applicability, since their injury is not significantly different from that suffered by taxpayers in general." *Women's Emergency Network v. Bush*, 323 F.3d 937, 943 (11th Cir. 2003).

[20] The importance of the issue, of course, was already discussed supra at 9-14.

> asserted harm is a *'generalized grievance' shared in substantially equal measure by all or a large class of citizens*, that harm alone normally does not warrant exercise of jurisdiction.

Plaintiffs' claims in this case fall squarely within *Warth*'s language, as the state taxpayer base – literally hundreds of thousands, and constituting virtually the entire adult population – surely constitutes a "large class of citizens." And the taxpayer harm, assuming generously that it exists at all,[21] is surely a " 'generalized grievance' shared in substantially equal measure" by that large class of citizens. Indeed, it would seem that *all* pure state taxpayer suits would run afoul of *Warth*.

Moreover, denying standing to these particular taxpayer plaintiffs would *not* mean that no one would have standing to challenge OHA's Hawaiian ancestry requirements. Persons who would otherwise qualify for OHA benefits (but for their non-Hawaiian status) and who actually desire them and take steps to obtain them could challenge any Hawaiian ancestry prerequisite for those benefits. There is simply no reason to allow these particular plaintiffs, who don't seek the benefits, and whose taxpayer injury, if any, is shared by virtually all adult citizens of Hawaii, to bring this generalized grievance, when others who are directly and particularly injured can do so.

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[21] *See ASARCO*, 490 U.S. at 613-14 (Kennedy, J., opinion) (taxpayer's interest in the treasury is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payments out of the treasury is remote, fluctuating and uncertain).

Accordingly, the Ninth Circuit's ruling could be reversed on this alternative *prudential* standing ground as well.[22] Indeed, the same concerns supporting rejection of *Article III* state taxpayer standing – including avoiding federal court resolution of abstract questions involving parties with no real interest at stake, preventing unnecessary interference with state governmental operations and administration of laws, preserving federalism and separation of powers, and conserving scarce judicial resources, etc., *see* supra at 9-13 – also support rejecting state taxpayer standing on this *prudential* ground as well. By upholding state taxpayer standing, and implicitly rejecting this prudential ground for dismissal, too, the Ninth Circuit's implicit prudential ruling raises these same important concerns, and together with its *Article III* ruling yield a direct conflict with the five other circuits rejecting general state taxpayer standing.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that certiorari be granted in this case to resolve the very important and fundamental state taxpayer standing questions presented by this petition, and to eliminate the direct conflict between the Ninth Circuit and at least five other circuits.

At the very least, given that this Court's eventual ruling in the *DaimlerChrysler Corp. v. Cuno/Wilkins v. Cuno* case could effectively reverse the Ninth Circuit's state taxpayer standing precedent, this Court should,

[22] State Defendants raised this prudential ground both in the District Court and in the Ninth Circuit.

respectfully, at minimum *hold* this petition pending this Court's ruling in the *Cuno* case. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th Ed. 1993) at 249 ("In most [GVR] situations, the certiorari papers are *held* by the Court pending its plenary ruling, following which the summary reconsideration order is entered."). In the event this Court in the *Cuno* case does indeed adopt Petitioner's position, or otherwise contradicts or narrows the broad state taxpayer standing doctrine adopted by the Ninth Circuit, this Court could then simply grant this certiorari petition, vacate the Ninth Circuit's decision (to the extent it granted plaintiffs state taxpayer standing to pursue some of their claims), and remand to the Ninth Circuit for reconsideration in light of the ruling in the *Cuno* case.[23]

Dated: February 2, 2006.

Respectfully submitted,

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[23] Of course, if this Court in the *Cuno* case were somehow able to avoid addressing the issue of state taxpayer standing (say, because another plaintiff in the case had a sufficient non-taxpayer basis for standing), then, for all the reasons provided in this petition, this Court should grant certiorari in *this* case, and conduct a *plenary* review.

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423 F.3d 954

United States Court of Appeals,
Ninth Circuit.

Earl F. ARAKAKI; Evelyn C. Arakaki; Edward U. Bugarin; Sandra P. Burgess; Patricia A. Carroll; Robert M. Chapman; Michael Y. Garcia; Toby M. Kravet; James I. Kuroiwa; Frances M. Nichols; Donna Malia Scaff; Jack H. Scaff; Allen Teshima; Thurston Twigg-Smith, Plaintiffs-Appellants,
Anthony Sang, Sr., State Council of Hawaiian Homestead Associations (SCHHA); State Council of Hawaiian Homestead Associations,
Intervenors-Appellees,

v.

Linda C. LINGLE, in her official capacity as Governor of the State of Hawaii; Haunani Apoliona, Chairman, and in her official capacity as trustee of the Office of Hawaiian Affairs; Rowena Akana, in his official capacity as trustee of the Office of Hawaiian Affairs; Donald Cataluna, in his official capacity as trustee of the Office of Hawaiian Affairs; Linda Dela Cruz, in her official capacity as trustee of the Office of Hawaiian Affairs; Clayton Hee, in his official capacity as trustee of the Office of Hawaiian Va Affairs; Colette Y. Machado, in her official capacity as trustee of the Office of Hawaiian; Charles Ota, in his official capacity as trustee of the Office of Hawaiian Affairs; Oswald K. Stender, in his official capacity as trustee of the Office of Hawaiian Affairs; John D. Waihee, IV, in his official capacity as trustee of the Office of Hawaiian Affairs; United States of America; John Does, 1 through 10; Georgina Kawamura, in her official capacity as Director of the Department of Budget and Finance; Russ Saito, in her official capacity as Comptroller and Director of the Department of Accounting and General Services; Peter Young, in his official capacity as Chairman of the Board of Land and Natural Resources;

Sandra Lee Kunimoto, in her official capacity as Director of the Department of Argiculture [sic]; Ted Liu, in his official capacity as Director of the Department of Business, Economic Development and Tourism; Rodney Haraga, in his official capacity as Director of the Department of Transportation; Quentin Kawananakoa, member of the Hawaiian Homes Commission, Defendants-Appellees.

No. 04-15306.

Argued and Submitted Nov. 1, 2004.
Filed Aug. 31, 2005.

H. William Burgess, Honolulu, HI, for the plaintiffs-appellants.

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Walter R. Schoettle, Honolulu, HI; Robert Klein, Honolulu, HI; Philip W. Miyoshi, McCorriston Miller Mukai MacKinnon LLP, Honolulu, HI, for the intervenors-appellees.

Le'a Malia Kanehe, Native Hawaiian LegalCorp., Honolulu, HI, for the amici curiae.

Appeal from the United States District Court for the District of Hawaii, Susan Oki Mollway, District Judge, Presiding. D.C. No. CV-02-00139-SOM/KSC.

Before: BRUNETTI, GRABER, and BYBEE, Circuit Judges.

BYBEE, Circuit Judge.

In this case we are called on, yet again, to hear a challenge to state programs restricting benefits to "native Hawaiians" or "Hawaiians." *See, e.g., Carroll v. Nakatani*, 342 F.3d 934 (9th Cir.2003); *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir.2002); *Han v. U.S. Dep't of Justice*, 45 F.3d 333 (9th Cir.1995) (per curiam); *Price v. Akaka*, 3 F.3d 1220 (9th Cir.1993); *Price v. Hawaii*, 764 F.2d 623 (9th Cir.1985); *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir.1984); *Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216 (9th Cir.1978); *see also Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000).

Plaintiffs in this case are citizens of the State of Hawaii who allege that various state programs preferentially treat persons of Hawaiian ancestry, in violation of the Fifth and Fourteenth Amendments, 42 U.S.C. § 1983, and the terms of a public land trust. Plaintiffs brought suit against the Department of Hawaiian Home Lands ("DHHL"), the Hawaiian Homes Commission ("HHC"), the Office of Hawaiian Affairs ("OHA"), various state officers, and the United States. Plaintiffs claim standing to sue as taxpayers and as beneficiaries of the public land trust. In a series of orders, the district court held that Plaintiffs lacked standing to raise certain claims and that Plaintiffs' remaining claims raised a nonjusticiable political question, and dismissed the entire lawsuit. *Arakaki v. Lingle*, 305 F.Supp.2d 1161 (D.Haw.2004) ("*Arakaki* VI"); *Arakaki v. Lingle*, 299 F.Supp.2d 1129 (D.Haw.2003) ("*Arakaki* V"); *Arakaki v. Lingle*, 299 F.Supp.2d 1114 (D.Haw.2003) ("*Arakaki* IV"); *Arakaki v. Cayetano*, 299 F.Supp.2d 1107 (D.Haw.2002) ("*Arakaki* III"); *Arakaki v. Cayetano*, 299 F.Supp.2d 1090 (D.Haw.2002) ("*Arakaki* II"); *Arakaki v. Cayetano*, 198 F.Supp.2d 1165 (D.Haw.2002) ("*Arakaki* I").

The district court also issued three unpublished orders, dated December 16, 2003, January 26, 2004, and May 5, 2004, which this opinion will address.

We affirm in part and reverse in part. We hold that Plaintiffs lack standing to sue the federal government and that the district court therefore correctly dismissed all claims to which the United States is a named party or an indispensable party. We affirm the district court in finding that Plaintiffs have demonstrated standing as state taxpayers to challenge those state programs that are funded by state tax revenue and for which the United States is not an indispensable party. Plaintiffs therefore have standing to bring a suit claiming that the OHA programs that are funded by state tax revenue violate the Equal Protection Clause of the Fourteenth Amendment. However, we reverse the district court's dismissal of that claim on political question grounds and hold that a challenge to the appropriation of tax revenue to the OHA does not raise a nonjusticiable political question. We therefore affirm in part, reverse in part, and remand.

I. BACKGROUND

A. *Historical Context*

After the arrival of Captain Cook in 1778, the western world became increasingly interested in the commercial potential of the Hawaiian Islands. The nineteenth century saw a steady rise in American and European involvement in the islands' political and economic affairs. As the resistance of the native Hawaiian government mounted, American commercial interests eventually succeeded, with the complicity of the U.S. military, in overthrowing the Hawaiian monarchy and establishing a provisional

government under the title of the Republic of Hawaii. *See Rice*, 528 U.S. at 500-05, 120 S.Ct. 1044.

In 1898, President McKinley signed a Joint Resolution to annex the Hawaiian Islands as a territory of the United States. 30 Stat. 750. This resolution, commonly referred to as the Newlands Resolution, provided that the Republic of Hawaii ceded all public lands to the United States and that revenues from the lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Id.* Two years later, the Hawaiian Organic Act established the Territory of Hawaii and put the ceded lands in the control of the Territory of Hawaii "until otherwise provided for by Congress." Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159.

B. *The Public Land Trust and the Hawaiian Homes Commission Act*

Shortly after the establishment of the Territory, Congress "became concerned with the condition of the native Hawaiian people." *Rice*, 528 U.S. at 507, 120 S.Ct. 1044. Declaring its intent to "[e]stablish[] a permanent land base for the beneficial use of native Hawaiians," Congress enacted the Hawaiian Homes Commission Act, 1920. Act of July 9, 1921, ch. 42, § 101(b)(1), 42 Stat. 108 ("HHCA"). The HHCA set aside 200,000 acres of lands previously ceded to the United States for the creation of loans and leases to benefit native Hawaiians. These lands were to be leased exclusively, including by transfer, to native Hawaiians for a term of 99 years at a nominal rate of one dollar per year. *Id.* § 208(1), (2) & (5). The HHCA defines "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Id.* § 201(7).

In 1959, Hawaii became the 50th State in the union. Under the Hawaii Statehood Admission Act, Congress required Hawaii to incorporate the HHCA into its state Constitution, with the United States retaining authority to approve any changes to the eligibility requirements for the HHCA leases. Act of March 18, 1959, Pub.L. No. 86-3, § 4, 73 Stat. 5 ("Admission Act"). *See* Haw. Const. art. XII, §§ 1-3. In return, the United States granted Hawaii title to all public lands within the state, save a small portion reserved for use of the Federal Government. *Id.* § 5(b)-(d), 73 Stat. 5. The Admission Act further declared that the lands, "together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by [the State] as a public trust for the support of the public schools, . . . the conditions of native Hawaiians" and other purposes. *Id.* § 5(f), 73 Stat. 6. The land granted to Hawaii included the 200,000 acres previously set aside under the HHCA and an additional 1.2 million acres.

The Hawaii Constitution expressly adopted the HHCA and declared that "the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out." Haw. Const. art. XII, § 2. Because the HHCA's purposes include support of public education, the Constitution also provides that lands granted to Hawaii under the Admission Act will be held in "public trust for native Hawaiians and the general public." *Id.* § 4; *see Arakaki v. Hawaii*, 314 F.3d 1091, 1093 (9th Cir.2002).

The HHCA established a Department of Hawaiian Home Lands ("DHHL"), to be headed by an executive board known as the Hawaiian Homes Commission

("HHC"). Act of July 9, 1921, ch. 42, § 202(a), 42 Stat. 108. By statute Hawaii created both the Department of Hawaiian Home Lands and the Hawaiian Homes Commission. Together, DHHL/HHC administer the 200,000 acres set aside by the HHCA, and DHHL/HHC's beneficiaries are limited to "native Hawaiians," as defined in the Act. The DHHL is funded in substantial part by state revenue; although the record is not clear on this point, this revenue likely derives from both tax and non-tax sources.

C. *The Office of Hawaiian Affairs*

In 1978, Hawaii amended its Constitution to establish the Office of Hawaiian Affairs to "'provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and . . . [to] unite Hawaiians as a people.'" *Rice*, 528 U.S. at 508, 120 S.Ct. 1044 (quoting 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13, p. 1018 (1980)). OHA holds title to all property "held in trust for native Hawaiians and Hawaiians," *except* for the 200,000 acres administered by DHHL/HHC; OHA thus controls the 1.2 million acres ceded by the United States in the Admission Act. The term "native Hawaiians" has the same blood quantum requirement as under the HHCA; by contrast, the term "Hawaiians" is broader and simply refers to any persons descended from inhabitants of the Hawaiian Islands prior to 1778. Haw. Rev. Stat. § 10-2. OHA's statutory purposes include "[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians," "conducting advocacy efforts for native Hawaiians and Hawaiians," "[a]pplying for, receiving, and disbursing,

grants and donations from all sources for native Hawaiian and Hawaiian programs and services," and "[s]erving as a receptacle for reparations." Haw. Rev. Stat. § 10-3(4)-(6).

OHA administers funds received from two principal sources. First, OHA receives a 20 percent share of any revenue generated by the 1.2 million acres of lands held in public trust. Haw. Rev. Stat. § 10-13.5 (1993). Second, OHA receives revenue from the state general fund, which derives from tax revenue and other, non-tax, sources.

D. *The Proceedings*

The Plaintiffs (some of whom qualify as "Hawaiians") allege that they are citizens of Hawaii, taxpayers of the state of Hawaii and of the United States, and beneficiaries of a public land trust created in 1898. The Complaint alleges three causes of action. First, Plaintiffs allege that the various programs of the OHA and DHHL/HHC violate the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. Second, they make these same allegations under 42 U.S.C. § 1983. Third, they claim that the administration of the OHA and the DHHL/HHC constitutes a breach of the public land trust.

The district court dismissed Plaintiffs' claims on grounds of standing and political question. With respect to the DHHL/HHC, the court ruled that the United States was an indispensable party to the lease eligibility requirements, but that Plaintiffs had no standing to sue the United States. *Arakaki* IV, 299 F.Supp.2d at 1120-25. Because "any challenge to the lessee requirements of the Hawaiian Home Lands lease program set up by the

HHCA, a state law, necessarily involves a challenge to the Admission Act," all claims against the DHHL/HHC were dismissed. *Id.* at 1126, 1127.

The district court took a slightly different route with respect to OHA. The court dismissed the breach of trust claim on the ground that Plaintiffs had not pleaded a breach of trust claim that is cognizable under the common law of trusts. *Arakaki* II, 299 F.Supp.2d at 1103. Finding that Plaintiffs had state taxpayer standing to sue OHA, the court declined to dismiss OHA because, unlike DHHL/HHC, "[n]othing in the Admission Act requires the creation of OHA or governs OHA's actions." *Arakaki* IV, 299 F.Supp.2d at 1127. The court limited the Plaintiffs' taxpayer challenge, however, to OHA programs funded from taxes, as opposed to programs funded from other sources. *Arakaki* II, 299 F.Supp.2d at 1100-01; *Arakaki* IV, 299 F.Supp.2d at 1122-24. In a subsequent decision, however, the district court dismissed all claims against OHA on the ground that they were barred by the political question doctrine. The court observed that, although Congress has plenary authority to recognize Indian tribal status, it has given Hawaiians some, but not all, of the privileges that go with formal tribal status. Because resolving Plaintiffs' equal protection claims would require the court to determine Hawaiians' political status in order to determine the appropriate level of scrutiny, the court declined to decide Hawaiians' current political status "in recognition of the continuing debate in Congress" and the principle that "this is a political issue that should be first decided by another branch of government." *Arakaki* VI, 305 F.Supp.2d at 1173.

Plaintiffs appeal the dismissal of all their claims.

II. STANDARD OF REVIEW

Standing is a legal issue subject to *de novo* review. *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir.1985). In ruling on a Fed. R. Civ. P. 12(b)(6) motion to dismiss for lack of standing, we must construe the complaint in favor of the complaining party. *Hong Kong Supermarket v. Kizer*, 830 F.2d 1078, 1080-81 (9th Cir.1987). As the district court noted, whether dismissal on political question grounds is jurisdictional or prudential in nature, and thus whether it is properly classified under Rule 12(b)(1) or 12(b)(6), is unclear. *Compare Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) (presence of a political question, like absence of standing, deprives court of jurisdiction), *with Goldwater v. Carter*, 444 U.S. 996, 1000, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) ("the political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government"). Either way, we review the district court's dismissal *de novo*. *See, e.g., Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595-96 (9th Cir.2004) (dismissal under Rule 12(b)(6) reviewed *de novo*); *Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109, 1111 n. 2 (9th Cir.2004) (dismissal for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1), reviewed *de novo*).

III. PLAINTIFFS' STANDING TO CHALLENGE THE DHHL/HHC LEASES

Plaintiffs claim standing to challenge the DHHL/HHC leases as land trust beneficiaries, and as state taxpayers. We find that neither theory confers standing to challenge the lease requirements or the appropriation of state revenue in support thereof. The district properly dismissed all claims against the DHHL/HHC and the United States.

A. *Plaintiffs' Standing as Land Trust Beneficiaries*

Plaintiffs challenge the public lands trust administered by DHHL/HHC because it prefers native Hawaiians in the lease eligibility criteria for the 200,000 acres set aside in the HHCA and incorporated into the Hawaii Constitution through the Admission Act. The Plaintiffs argue that as members of the class of "native Hawaiians and general public," Haw. Const. art. XII, § 4, they are trust beneficiaries, and may sue the trustee when the trustee's actions violate the law. *See* Restatement (Second) of Trusts §§ 166, 214. Plaintiffs allege that the trustees – including DHHL/HHC and the United States – have enforced the provisions of the trust in violation of the Fifth and Fourteenth Amendments.

1. The United States as Trustee

Plaintiffs argue that the trust obligations of the United States arise through two acts, the Newlands Resolution and the Admission Act. Plaintiffs claim the trust was first established in 1898 by the Newlands Resolution with the United States as trustee. Congress, according to Plaintiffs, then violated its duties as trustee by discriminating on the basis of race when it enacted the HHCA in 1921 and again in the Admission Act when it required Hawaii to incorporate the HHCA into its Constitution. Alternatively, Plaintiffs argue that the United States became a trustee as a result of the Admission Act.[1]

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[1] The district court concluded that Plaintiffs had waived the Newlands Resolution theory, and addressed only the Admission Act theory. *Arakaki* II, 299 F.Supp.2d at 1101. Plaintiffs deny the waiver. However, this court can affirm the district court's dismissal on any

(Continued on following page)

The history of the land trust does not support either of Plaintiffs' theories. The United States is not currently a trustee of the lands in question by virtue of either the Newlands Resolution or the Admission Act. The Newlands Resolution recited that the Government of the Republic of Hawaii ceded "the absolute fee and ownership of all public Government, or Crown lands." Newlands Resolution, 30 Stat. 750 (1898). It further provided that existing U.S. laws regarding public lands would not apply to Hawaiian lands, but that Congress "shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same . . . shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Id.* Although this passage did not specifically use the word "trust," the Attorney General of the United States subsequently interpreted it "to subject the public lands in Hawaii to a special trust." *Hawaii – Public Lands*, 22 Op. Att'y Gen. 574, 576 (1899).

Assuming, *arguendo*, that the Attorney General was right to construe the Newlands Resolution as establishing a trust, and assuming further that the United States became a trustee, the United States' status as trustee was expressly subject to future revision. The Resolution specifically provides that "the United States shall enact special laws for [the] management and disposition" of public lands. The Attorney General construed this provision as "vest[ing] in Congress the exclusive right, by

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ground supported by the record, even if the district court did not rely on the ground. *See, e.g., Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 403 F.3d 1050, 1058 (9th Cir.2005). In the interest of being thorough, we therefore address both theories.

special enactment, to provide for the disposition of public lands in Hawaii." *Id.* The Newlands Resolution thus contemplated that Congress would enact subsequent rules to govern the ceded lands.

Congress enacted such rules in the HHCA and the Admission Act. Any trust obligation the United States assumed in the Newlands Resolution for the lands at issue here was extinguished by Congress when it created the DHHL/HHC in the HHCA and granted it control of defined "available lands." Act of July 9, 1921, ch. 42, §§ 202, 204, and 207; *See id.* § 204(a) ("Upon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the department to be used and disposed of in accordance with the provisions of this Act."). Any lingering doubt over the United States' role as trustee was eliminated entirely in the Admission Act when the United States "grant[ed] to the State of Hawaii, effective upon its admission in the Union, the United States' title to all the public lands and other public property, and to all lands defined as 'available lands' by section 203 of the Hawaiian Homes Commission Act . . . title which is held by the United States immediately prior to its admission into the Union." Pub.L. No. 86-3, § 5(b), 73 Stat. 4.

Our discussion here also resolves Plaintiffs' claim that the Admission Act established the United States' obligations as a trustee. The Admission Act unambiguously requires that land be held in public trust, but by the State of Hawaii, not the United States. Nothing in the Admission Act suggests that the United States would serve as a co-trustee with the State. Nor does the fact that the United States must consent to changes in the qualifications of lessees under the trust make the United States a

co-trustee. *See* Pub.L. No. 86-3, § 4, 73 Stat. 4. Congress might have made the United States a co-trustee; instead it reserved to the United States the right to bring suit for breach of trust, *id.* § 5(f), a provision at odds with the suggestion that the United States remains a trustee. We conclude, as we noted in *Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1224 n. 7 (9th Cir.1978), that "[t]he United States has only a somewhat tangential supervisory role of the Admission Act, rather than the role of trustee."

2. The United States as an Indispensable Party

Although the United States cannot be sued on Plaintiffs' trust beneficiary theory, Plaintiffs nevertheless argue that they may at least sue the state defendants on the same theory. Plaintiffs point to several cases in which we have held that native Hawaiians, as trust beneficiaries, could bring suit under 42 U.S.C. § 1983 against the State to enforce the terms of the trust. *E.g., Price v. Akaka*, 928 F.2d 824 (9th Cir.1990); *Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467 (9th Cir.1984); *see also Price v. Akaka*, 3 F.3d 1220, 1223-25 (9th Cir.1993). Those cases involved claims that the state was improperly administering the trust and sought to enforce the trust's terms.

We believe that this argument is disposed of easily. Those cases differ from the present challenge in a fundamental way: although those previous § 1983 cases have involved suits to enforce the express terms of the trust, this suit, by contrast, asks the court to prohibit the enforcement of a trust provision. That is, Plaintiffs now raise a § 1983 claim that is unique in that it does not seek to

enforce the substantive terms of the trust, but instead challenges at least one of those terms as constitutionally *unenforceable*.

We have recently held that in any challenge to the enforceability of the lease eligibility requirements, the United States is an indispensable party. In *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir.2003), a non-native Hawaiian citizen challenged the homestead lease program administered by DHHL/HHC. The plaintiff sued the relevant state actors, but failed to sue the United States. We held that Section 4 of the Admissions Act "expressly reserves to the United States that no changes in the qualifications of the lessees may be made without its consent." *Carroll*, 342 F.3d at 944. We reasoned that because the qualifications for the DHHL/HHC leases cannot be modified without the United States' approval, the United States is an indispensable party to any lawsuit challenging the DHHL/HHC leases, and the Plaintiff's failure to sue the United States meant that his injury was not redressable. *Id.* at 944.

Here, unlike in *Carroll*, Plaintiffs properly named the United States as a party. *Carroll's* logic nonetheless applies. Plaintiffs lack standing to sue the United States, but the United States is an indispensable party to any challenge to the lease eligibility requirements. Plaintiffs therefore cannot maintain their challenge to the lease eligibility requirements against the State. Accordingly, the district court properly dismissed the Plaintiffs' trust beneficiary claim against the state defendants.

B. *Plaintiff's Standing As State Taxpayers*

Plaintiffs also challenge the DHHL/HHC lease eligibility programs in their capacity as state taxpayers. The question is whether our decision in *Carroll* bars Plaintiffs' equal protection challenge in their capacity as taxpayers, just as it barred Plaintiffs' suit in their capacity as trust beneficiaries. In particular, we must decide whether Plaintiffs have standing to challenge Hawaii's spending of tax revenues on the lease program.[2] This is a more complicated question.

The standing doctrine, like other Article III doctrines concerning justiciability, ensures that a plaintiff's claims arise in a "concrete factual context" appropriate to judicial resolution. *Valley Forge Christian Coll. v. Ams. United For Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Standing ensures that, no matter the academic merits of the claim, the suit has been brought by a proper party. The "'irreducible constitutional minimum of standing'" requires that a plaintiff allege that he has suffered concrete injury, that there is a

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[2] Plaintiffs do not limit their challenge to the expenditure of state tax revenues; instead, they challenge *all* state spending on the lease program, whether funded by taxes, bonds, the proceeds of a settlement, or other non-tax revenues. The district court held that, if Plaintiffs could bring their equal protection claims against DHHL/HHC based on their taxpayer status at all, they could challenge only those avenues of state funding that actually derived from taxes, rather than from other sources. Because we conclude, like the district court, that *Carroll* precludes Plaintiffs' challenge to Hawaii's spending on the lease program regardless of the source of the state's funds, we need not decide here whether the district court correctly limited the scope of Plaintiff's state taxpayer challenges. We limit our discussion to Plaintiffs' challenge to Hawaii's spending of tax revenues on the lease program and address the general question regarding the scope of standing as a state taxpayer in Part IV.A.3, *infra*.

causal connection between his injury and the conduct complained of, and that the injury will likely be redressed by a favorable decision. *United States v. Hays*, 515 U.S. 737, 742-43, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

Plaintiffs have alleged that Hawaii has supported the lease program through tax revenues, a point that Hawaii does not dispute. *Arakaki* II, 299 F.Supp.2d at 1098. Hawaii's taxing and spending in support of the lease program is not mandated by the Admission Act or any other federal law. The Admission Act requires Hawaii to adopt the HHCA and forbids Hawaii to change the lease eligibility requirement without the consent of the United States; but neither the Admission Act nor the HHCA, as incorporated by the Hawaii Constitution, mandates the expenditure of state funds, much less the expenditure of state tax revenues. Pub.L. No. 86-3, § 4, 73 Stat. 4. Section 5(f) of the Admission Act does provide that proceeds from the sale or other disposition of the lands shall be paid into the trust for the identified purposes, but nothing suggests, much less requires, that the State of Hawaii expend tax revenues to support the lease program. Any tax revenues Hawaii has appropriated to DHHL/HHC, then, resulted from decisions by the Hawaii Legislature.

Plaintiffs' taxpayer-based claims might be construed as a limited challenge to the lease program: Plaintiffs challenge the lease program to the extent that Hawaii has – independent of any federal obligation, including the Admission Act – engaged in taxing and spending in support of the DHHL/HHC program. Under this theory, unlike their trust beneficiary theory, Plaintiffs would not challenge the lease eligibility requirements directly, nor

would they implicate any substantial rights belonging to the United States. Thus, Plaintiffs might argue, even if they cannot seek to enjoin the native Hawaiians-only rule directly, they can seek to enjoin further state funding of a provision that allegedly violates the Equal Protection Clause. Plaintiffs' remedy, presumably, would be an injunction against spending state tax revenues, but not an order directing changes in the lease criteria.

Plaintiffs' theory, though game, ultimately fails under *Carroll*. The only ground Plaintiffs have alleged for enjoining the state from spending is that the spending is for purposes prohibited by the Equal Protection Clause. Any remedy that Plaintiffs seek – for example, an injunction against expenditure of tax revenues for the lease program – demands that the district court decide whether the lease eligibility criteria are constitutional. The lease criteria are found in the HHCA which is adopted by Article XII of the Hawaii Constitution. We held in *Carroll*, however, that "Article XII of the Hawaiian Constitution cannot be declared unconstitutional without holding [Section 4] of the Admissions Act unconstitutional." *Carroll*, 342 F.3d at 944. Our decision in *Carroll* effectively holds that any challenge to Article XII is a challenge to Section 4 of the Admission Act, and no challenge to the Admission Act may proceed without the presence of the United States as a defendant.

As state taxpayers, Plaintiffs have no basis for suing the United States. They claim no status that would distinguish them from any number of other persons who also do not qualify for the Hawaiian Home Lands leases. The Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal government conduct as sufficient for standing." *Hays*, 515 U.S. at 743, 115 S.Ct.

2431. Moreover, "[t]he rule against generalized grievances applies with as much force in the equal protection context as in any other." *Id.*; *see Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Federal taxpayer standing which, notably, Plaintiffs do not assert, is simply one instance of the assertion of a generalized grievance. *See Frothingham v. Mellon*, 262 U.S. 447, 487-88, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) ("The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern.").

We hold that Plaintiffs cannot avoid the implications of *Carroll* by limiting their claims to state spending in support of the lease program and then alleging their state taxpayer status. Even if Plaintiffs have standing as state taxpayers – a subject we address in earnest in Part IV – that status cannot supply standing against the United States. *See, e.g., Frothingham*, 262 U.S. at 486-87, 43 S.Ct. 597 (citing *Crampton v. Zabriskie*, 101 U.S. 601, 609, 25 L.Ed. 1070 (1880)); *W. Mining Council v. Watt*, 643 F.2d 618, 631 (9th Cir.1981). Accordingly, we conclude that Plaintiffs lack standing to sue the United States, and that the United States remains an indispensable party to any challenge to the DHHL/HHC lease eligibility criteria. We affirm the district court's dismissal of all claims against the United States and DHHL/HHC.

IV. PLAINTIFFS' STANDING TO CHALLENGE OHA'S PROGRAMS

As with DHHL/HHC, Plaintiffs allege two theories of standing to challenge OHA: they challenge the appropriation

of state tax revenue based on their status as state taxpayers, and they challenge the appropriation of trust revenue to OHA based on their alleged status as trust beneficiaries. Relying in large measure on our decision in *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir.1984), the district court held that Plaintiffs had standing to sue OHA as state taxpayers. *Arakaki* II, 299 F.Supp.2d at 1094-98. The court further held, however, that Plaintiffs lacked standing to challenge state funding of OHA that did not originate in taxes, specifically, any revenue that OHA received from lease rentals, settlements, or state bonds. *Id.* at 1100-01. With respect to the trust revenue claim, the district court dismissed the breach of trust claim on the ground that Plaintiffs had not pleaded a trust claim that was cognizable under the common law of trusts. *Id.* at 1103.

OHA contends that the district court erred because our prior decision in *Hoohuli* has been effectively overruled by *ASARCO Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989), and because the United States is an indispensable party under *Carroll*. Plaintiffs allege that the district court erred by restricting the scope of their challenge to OHA programs directly funded by taxes.

We address each of these contentions in turn. We conclude that *Hoohuli* remains valid law in this circuit and that the United States is not an indispensable party to the suit challenging the appropriation of state tax revenue. Accordingly, Plaintiffs have standing as state taxpayers to challenge the appropriation of state revenue to OHA. We agree with the district court, however, that Plaintiffs' state taxpayer standing limits their claims to revenue that derives directly from taxes. Finally, we conclude, as we did in the prior section, that Plaintiffs

cannot prevail on their trust beneficiary theory of standing because the United States remains an indispensable party to a suit challenging the trust, and Plaintiffs have no standing to sue the United States.

A. *Plaintiffs' State Taxpayer Standing*

1. The Vitality of *Hoohuli*

In *Hoohuli,* residents of Hawaii and a taxpayers' group brought suit under 42 U.S.C. § 1983 for damages and injunctive relief to challenge programs administered by OHA to the extent those programs favored "Hawaiians." 741 F.2d at 1172. We held that at least some of the individual plaintiffs had standing to seek to enjoin the "appropriating, transferring, and spending" of taxpayers' money from the state treasury's general fund. *Id.* at 1180. The plaintiffs had alleged that they had "'been burdened with the necessity to provide more taxes to support [the class of "Hawaiians"]'" and that this was sufficient to sustain a "'good-faith pocketbook action' set forth in *Doremus* [*v. Board of Education*, 342 U.S. 429, 434, 72 S.Ct. 394, 96 L.Ed. 475 (1952)]." *Id.*

Conceding that *Hoohuli* controls this case unless there is an intervening change in the law, OHA argues that the Supreme Court's decision in *ASARCO* has effectively overruled *Hoohuli. See Price v. Akaka*, 3 F.3d 1220, 1224 (9th Cir.1993) (addressing an analogous argument that an intervening Supreme Court decision overruled our precedent). In *ASARCO*, Arizona taxpayers brought suit in Arizona state court to enjoin a state law governing mineral leases on state lands. The taxpayer plaintiffs alleged that the state lands had been granted to Arizona by the United States when it acquired statehood and that the statute

violated the terms Congress specified for the disposal of lands granted by the U.S. to Arizona. Reviewing a judgment of the Arizona Supreme Court, the U.S. Supreme Court considered "whether, under federal standards, the case was nonjusticiable at its outset because the original plaintiffs lacked standing to sue." 490 U.S. at 612, 109 S.Ct. 2037. Four members of the Court[3] held that if the plaintiffs had brought the suit in federal court, they would not have had standing by virtue of their status as state taxpayers. They noted that "[a]s an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts," but that "the same conclusion may not hold for municipal taxpayers." *Id.* at 613, 109 S.Ct. 2037 (Kennedy, J.). They observed that it has "likened state taxpayers to federal taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." *Id.* at 613-14, 109 S.Ct. 2037 (quoting *Doremus*, 342 U.S. at 434, 72 S.Ct. 394). Ultimately the Court concluded that, although the plaintiffs (respondents in the Supreme Court) would not have had standing to commence suit in federal court, the petitioner-defendants had standing to seek review in the Supreme Court of a judgment from Arizona courts that are not themselves bound by federal standing rules. *Id.* at 617-19, 109 S.Ct. 2037. Four justices argued that the question of the standing of the state taxpayers was "'irrelevant'

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[3] Although we have occasionally referred to that portion of Justice Kennedy's opinion, Part II.B.1, as a plurality, *see, e.g., Graham v. Federal Emergency Mgmt. Agency*, 149 F.3d 997, 1003 (9th Cir.1998), that is not strictly correct. Because Justice Brennan wrote an opinion concurring in the judgment on behalf of four justices, and Justice O'Connor did not participate in the decision, Part II.B.1 of Justice Kennedy's opinion is for an equally divided Court.

when the petitioners were defendants below, and the plurality's discussion was therefore 'unnecessary.'" *Id.* at 633-34, 109 S.Ct. 2037 (Brennan, J., concurring in part and concurring in the judgment).

Whether Justice Kennedy's opinion is dictum or not, that portion of his opinion on state taxpayer standing is not the opinion of the Supreme Court. *See, e.g., Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); *see also Townsend v. Quasim*, 328 F.3d 511, 519 n. 3 (9th Cir.2003) (citing *Smith v. Univ. of Wash., Law Sch.*, 233 F.3d 1188, 1199 (9th Cir.2000)). It may carry persuasive value to a court that has not previously ruled on state taxpayer standing, but an opinion from an evenly divided Court is not a precedentially binding intervening opinion of the Court. We therefore may not hold our prior opinion in *Hoohuli* overruled by an opinion of four Justices, even if we thought it persuasive, without obtaining en banc review.

The state defendants point to our statement in *Bell v. City of Kellogg* that "[t]he same constitutional standing principles apply to those suing in federal court as state taxpayers" as evidence that we have embraced Justice Kennedy's view. 922 F.2d 1418, 1423 (9th Cir.1991) (citing *ASARCO*, 490 U.S. at 612, 109 S.Ct. 2037). We explained in *Cammack v. Waihee* that in *Bell* "we implied some sympathy toward Justice Kennedy's views. However, we also made clear that *Hoohuli* remained the controlling circuit precedent. *Bell* should not be interpreted as altering the law of this circuit on state taxpayer standing." 932 F.2d 765, 770 n. 9 (9th Cir.1991) (citations omitted).

Notwithstanding our statement in *Cammack*, the state defendants bravely argue that after *ASARCO*,

Hoohuli's state taxpayer standing principle is limited to Establishment Clause cases. *See, e.g., PLANS v. Sacramento City Unified Sch. Dist.*, 319 F.3d 504 (9th Cir.2003); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789 (9th Cir.1999) (en banc); *Cammack*, 932 F.2d 765. There is no principled basis for this argument in our cases. First, for the reasons we have explained, *Hoohuli* remains good law and is very much on point here. Second, neither *ASARCO* nor *Hoohuli* involved Establishment Clause claims; neither case says anything about the Establishment Clause. OHA has not explained why *ASARCO* effectively overrules *Hoohuli* except in Establishment Clause cases. Third, the state parties point to *Cammack*, in which we found state and municipal taxpayer standing in Hawaii residents who claimed that Hawaii's Good Friday holiday violated the Establishment Clause. Nothing in *Cammack* purports to limit state taxpayer standing to Establishment Clause cases. Much to the contrary, *Cammack* described *Hoohuli* as "the leading case on this issue in the circuit," 932 F.2d at 769, denied that *ASARCO* affected *Hoohuli, id.* at 770 n. 9, and distinguished any contrary implication in *Bell, id.* It is difficult to conceive of a clearer affirmation of *Hoohuli's* status in this circuit. *See also Doe*, 177 F.3d at 794 (en banc) (citing *Hoohuli* favorably). Our decision in *Hoohuli* remains the law of the circuit until our court, sitting en banc, overrules it, or until the Supreme Court, in a majority opinion, plainly undermines its principles.

2. The United States as an Indispensable Party

OHA argues that even if Plaintiffs have taxpayer standing, under *Carroll* the United States is also an indispensable party to any equal protection challenge to its programs. The district court rejected the argument on

the ground that DHHL/HHC and OHA have distinct origins. In contrast to DHHL/HHC, "[n]othing in the Admission Act requires the creation of OHA or governs OHA's actions." *Arakaki* IV, 299 F.Supp.2d at 1127.

The district court is correct with respect to OHA's expenditure of tax revenue. OHA was created nearly twenty years after Hawaii's admission to the union. In 1978, Hawaii amended its Constitution to add Sections 5 and 6 – creating OHA and defining its duties – to Article XII. *See* Haw. Const. art. XII, §§ 5-6. The Constitution does not provide for OHA's funding, which is provided by statute. *See, e.g.,* Haw. Rev. Stat. §§ 10-3(1) ("A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the legislature."), 10-13.5 ("Twenty per cent of all funds derived from the public land trust . . . shall be expended by [OHA]. . . . "). Unlike the lease eligibility requirement imposed by the HHCA and administered by DHHL/HHC, the United States has no right to consent or withhold consent to the creation of OHA or its administration of programs for native Hawaiians or Hawaiians. Because Plaintiffs can prevail against OHA "without holding [Section 4] of the Admissions Act unconstitutional," nothing "requires the participation of . . . the United States." *Carroll*, 342 F.3d at 944. We decline to extend *Carroll* to claims against OHA concerning tax revenue.

3. Limiting Plaintiffs' State Taxpayer Claims

Plaintiffs contend that the district court erred when it denied Plaintiffs' right to "seek invalidation of . . . OHA *in toto*." *Arakaki* IV, 299 F.Supp.2d at 1122. Although the

parties have stipulated that the legislature has appropriated monies from the General Fund to OHA, the district court held that "to the extent . . . OHA programs rely on funds other than tax money, Plaintiffs do not have state taxpayer standing to challenge those programs," *id.* at 1123-24, including home land lease revenues, payments of settlements, and bond revenues. *Arakaki* II, 299 F.Supp.2d at 1100-01.

The issue Plaintiffs raise is this: Does a taxpayer have standing to challenge government spending if the funds actually challenged did not accrue as a result of taxes? While we think that to state the question is nearly to answer it, the parties have not located any case directly on point. The answer, nevertheless, is implicit in the Supreme Court's limited recognition of taxpayer standing.

As we have discussed, in order to satisfy the case or controversy provision of Article III, a federal plaintiff must demonstrate an injury in fact, a causal relationship between the injury and the conduct complained of, and that the injury can be redressed. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. The whole theory of taxpayer standing is that if the suit is successful, the court will enjoin the spending which will relieve the plaintiff's tax burden. The Court has hesitated to recognize federal taxpayer standing because any effect on federal spending may only remotely affect the parties' tax bill. As the Court wrote in *Frothingham v. Mellon*, a federal taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others . . . and the effect upon future taxation, of any payment out of the funds, is so remote, fluctuating and uncertain, that no basis is afforded for [judicial review]." 262 U.S. at 487, 43 S.Ct. 597. If the "remote[ness]" and "uncertain[ty]" of the remedy was so great that the taxpayers did not have

Article III standing, it only stands to reason that the taxpayer would lack standing if the "effect upon future taxation" was nil because taxes were not involved at all. *See Flast v. Cohen*, 392 U.S. 83, 92, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) ("the petitioner in *Frothingham* was denied standing not because she was a taxpayer but because her tax bill was not large enough:"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 421 (3d ed. 2000) ("[A]n individual may have a sufficient interest, in his or her capacity as a taxpayer, to challenge *spending* programs of the taxing government, on the theory – or, more candidly, the fiction – that a successful suit against such a program can result in some decrease in the litigant's taxes.").

In *Flast*, 392 U.S. at 102, 88 S.Ct. 1942, the Court emphasized that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id.* at 102, 88 S.Ct. 1942. A taxpayer must demonstrate "a measurable appropriation or disbursement of . . . funds occasioned solely by the activities complained of." *Doremus*, 342 U.S. at 434, 72 S.Ct. 394. In a series of cases, the Court rejected taxpayer standing in circumstances in which no tax expenditures were involved, even though the challenged program, if found unconstitutional, might have saved the public fisc. In *Valley Forge College*, for example, the plaintiffs complained of a transfer of surplus government property to a religiously affiliated college. The Court held that the plaintiffs lacked standing as federal taxpayers: "the property transfer about which [plaintiffs] complain

was not an exercise of authority conferred by the Taxing and Spending Clause . . . [but] an evident exercise of Congress' power under the Property Clause. . . . Respondents do not dispute this conclusion, and it is decisive of any claim of taxpayer standing." 454 U.S. at 480, 102 S.Ct. 752 (citations omitted). *See also Schlesinger*, 418 U.S. at 228, 94 S.Ct. 2925; *United States v. Richardson*, 418 U.S. 166, 174-75, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974).

Our cases follow this principle consistently. In *Doe*, we held that taxpayers lacked standing to challenge the practice of sponsoring prayers at high school graduation because "Doe identifie[d] no tax dollars that defendants spent solely on the graduation prayer, which is the only activity that she challenges." 177 F.3d at 794. The fact that the school district expended funds for graduation generally was irrelevant to the standing inquiry. Similarly, in *Cammack*, we held that Hawaii taxpayers had standing to challenge a Hawaii statute making Good Friday a state holiday. We specifically found that the complaint sufficiently alleged that "state and municipal tax revenues fund the paid holiday for government employees" and that the "actual expenditure of tax dollars" stated "the necessary injury." 932 F.2d at 771, 772; *see also Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir.2001) ("To establish standing in a state or municipal taxpayer suit under Article III, a plaintiff must allege a direct injury caused by the expenditure of tax dollars.").

If we permitted Plaintiffs to challenge OHA's programs across the board, irrespective of the origin of the funding, it would greatly expand the effect of their taxpayer standing to programs that they would not otherwise have standing to challenge. Given the care with which the

Supreme Court has looked at taxpayer injury and redressability, we cannot go so far. *See, e.g., Allen*, 468 U.S. at 751-53, 104 S.Ct. 3315; *see also Lujan*, 504 U.S. at 560, 112 S.Ct. 2130.

Plaintiffs object to the district court's disallowing its standing to challenge three sources of OHA funding: (1) funds received from the Hawaiian home lands trust, (2) funds received through a settlement of prior claims, and (3) bonds issued to secure the settlement. By law twenty percent of "all funds derived from the public land trust" are dedicated to the use of OHA. Haw. Rev. Stat. § 10-13.5. The funds OHA receives from the trust, which are apparently largely rents, are first paid into Hawaii's General Fund and then paid to OHA. *See Arakaki* II, 299 F.Supp.2d at 1100. The district court found that this was simply an "administrative 'pass-through'" and concluded that because these are dedicated funds, the fact that the funds pass through the General Fund is irrelevant. We agree with the district court that Plaintiffs, as taxpayers, may not challenge the expenditure of such non-tax revenues.

Plaintiffs' challenge to funds paid in settlement is more complicated. In 1993, the legislature appropriated more than $135 million to OHA's trust fund to settle past claims. The district court questioned whether, as taxpayers, Plaintiffs could challenge the settlement since it would "nullify [] a settlement reached years earlier" and "would be tantamount to having the court review the wisdom, at any time, of every legislative decision, regardless of when made, to settle a case rather than to litigate it." *Id.* at 1100 & n. 10. The district court's concerns are well-stated, but we do not need to go so far as to hold that

taxpayers may never challenge a legislature-ordained settlement.

The provenance of the settlement at issue here is quite unusual. As we have pointed out, when Hawaii created the OHA, it allocated to OHA twenty percent of "all funds derived" from the public land trust. Haw. Rev. Stat. § 10-13.5. The statute, however, did not define the term "funds," and it was not clear what OHA was entitled to receive. In 1983, OHA's trustees filed suit against various state officials, claiming that OHA had not received its twenty percent share of "funds," specifically settlements concerning lands in the public trust. On appeal, the Hawaii Supreme Court ruled that the term "funds" was so ambiguous that the court could not resolve the intra-government dispute, and it declined judgment because of the state's political question doctrine. *Trustees of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 174-75, 737 P.2d 446, 458 (1987). In response, the Hawaii Legislature amended Section 10-13.5, substituting the word "revenue" for "funds." Act 304, § 7, Haw. Sess. Laws 947, 951 (1990). In 1993, the legislature appropriated $136.5 million to OHA in settlement of OHA's claims from 1980 through 1991. *Id.* § 8, Haw. Sess. Laws at 951; Act 35, § 3, Haw. Sess. Laws 41 (1993).[4] Whatever the revenue origins of the $136.5 million allocated in 1993, the legislature paid these funds as compensation for revenues that OHA did not receive between 1980-91 that were generated by the public

[4] In *Office of Hawaiian Affairs v. State*, 96 Hawai'i 388, 31 P.3d 901 (2001), the Hawaii Supreme Court ruled that the 1990 amendments to Section 10-13.5 conflicted with federal law. Under Hawaii law, Section 10-13.5 was reverted to its pre-amendment language. Thus, the current version of Section 10-13.5 again reads "funds."

land trust. Since the original revenues were not tax-based, Plaintiffs lack standing to challenge these expenditures.

For similar reasons, Plaintiffs cannot challenge the bonds issued by the state to fund these settlements. Whether some tax monies are used to service or repay the bonds, the bonds fund a settlement of land revenues owed to OHA. We affirm the district court's ruling that Plaintiffs may not challenge these funds paid in settlement and financed through general bonds.

B. *Plaintiffs' Trust Beneficiary Standing*

Plaintiffs allege, as an independent basis for standing, that as trust beneficiaries they may sue OHA because OHA receives trust revenues. Although the United States is not an indispensable party to a challenge to the appropriation of *tax* revenue, *see* Part IV.A.2, *supra*, this is not true with respect to OHA's receipt of *trust* revenue. We have previously held that the expenditure of trust revenue is governed by the Admission Act. *Price v. Akaka*, 928 F.2d 824, 827 (9th Cir.1990). Any challenge to the expenditure of trust revenue brought by alleged trust beneficiaries must challenge the substantive terms of the trust, which are found in the Admission Act. For the reasons we explained in Part III.A.2, *supra*, the United States is an indispensable party to any challenge to the Admission Act. Accordingly, although the United States is not an indispensable party with respect to challenges to OHA's expenditure of *tax* revenue, it remains indispensable with respect to challenges to the expenditure of *trust* revenue.

Plaintiffs' attempt to challenge OHA's expenditure of trust revenue thus suffers from the same fatal flaw as its

challenge to the DHHL/HHC lease eligibility requirements. The United States is an indispensable party to the challenge to the expenditure of trust revenue, and yet Plaintiffs cannot establish standing to sue the United States either as taxpayers or as trust beneficiaries. *See* Parts III.A.2 and III.B., *supra*. Plaintiffs therefore cannot proceed with that claim. We do not reach the issue whether Plaintiffs' breach of trust claim is otherwise cognizable under the common law of trusts, which was the basis of the district court's dismissal of the breach of trust claim against OHA. Rather, we affirm the dismissal on the alternative ground that Plaintiffs cannot demonstrate standing to sue an indispensable party.

V. POLITICAL QUESTION

The remaining question is whether Plaintiffs' surviving cause of action – namely, that the appropriation of state tax revenue to OHA violates the Equal Protection Clause of the Fourteenth Amendment – presents a nonjusticiable political question. The district court reasoned that in order to rule on Plaintiffs' equal protection claims, the court would have to determine what level of scrutiny to apply. *Compare Grutter v. Bollinger,* 539 U.S. 306, 328-33, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (applying strict scrutiny to uphold race-conscious admissions policy at state university law school), *and Gratz v. Bollinger*, 539 U.S. 244, 270-75, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (striking down race-conscious undergraduate admissions policy at state university under strict scrutiny), *with Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (applying rational basis, rather than strict scrutiny, to employment preference that benefitted members of Indian tribe because it furthered Indian

self-government), *and Alaska Chapter, Associated Gen. Contractors of Am., Inc. v. Pierce*, 694 F.2d 1162 (9th Cir.1982) (applying rational basis test to native Alaskans based on the federal government's "special obligation" to Indians). The district court reasoned that although Congress has plenary authority over Indian affairs, it "has not yet clearly recognized Hawaiians as being equivalent to Indians or Indian tribes for purposes of the [*Mancari*] analysis." *Arakaki* VI, 305 F.Supp.2d at 1172. Noting that "Congress has begun to include Hawaiians as beneficiaries in bills providing services to Native Americans" and had pending before it the "Akaka Bill" that would "equate Hawaiians to Indians and/or Indian tribes," the court observed that "Congress is still speaking on the issue." *Id.* at 1173. The district court concluded that Congress "should make the decision as to whether Hawaiians should be treated as Indians for purposes of the [*Mancari*] analysis" and, "in recognition of the continuing debate," the court would "defer[] to Congress." *Id.* at 1173, 1174. We hold that these claims do not raise a nonjusticiable political question. We therefore reverse the district court's dismissal on political question grounds, and remand.

Chief Justice Marshall explained in *Marbury* that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803). The Court announced the modern formulation of the political question doctrine in *Baker v. Carr*:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2]

> a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *see Alperin v. Vatican Bank*, 410 F.3d 532, 537-40 (9th Cir.2005); *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir.2005); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1275 (9th Cir.2004), *cert. denied*, ___ U.S. ___, 125 S.Ct. 2902, 162 L.Ed.2d 294 (2005).

We have recently addressed the political question doctrine in the context of a challenge to the executive's failure to recognize Hawaiians as federal Indian tribes in *Kahawaiolaa*, 386 F.3d 1271. In that case, native Hawaiians alleged that the Department of Interior had violated the equal protection component of the Fifth Amendment in regulations limiting recognition of new tribes to "'these American Indian groups indigenous to the continental United States'" – which meant that "native Hawaiians are excluded from eligibility to petition for tribal recognition under the regulations." *Id.* at 1274 (quoting 25 C.F.R. § 83.3(a)). The district court dismissed the suit against the Department of Interior, in part because matters of tribal recognition raise nonjusticiable political questions. We disagreed with the district court on this point. We noted that "[i]f the question before us were whether a remedy

would lie against Congress to compel tribal recognition, the answer would be readily apparent. . . . a suit that sought to direct Congress to federally recognize an Indian tribe would be non-justiciable as a political question." *Id.* at 1275-76. We found, however, that the plaintiffs did not seek tribal recognition; rather, they wanted the Department of Interior to allow them to apply for recognition "under the same regulatory criteria applied to indigenous peoples in other states." *Id.* at 1276. We concluded that the plaintiffs' suit was not barred by the political question doctrine.

In order to stay our hand in this case, we must determine that the resolution of Plaintiffs' equal protection claims against OHA would interfere with the constitutional duties of one of the political branches, whether that duty has been exercised or not. The district court and the state defendants locate that "textually demonstrable constitutional commitment of the issue" in Article I, Section 8, Clause 3 of the U.S. Constitution: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes." The Court has observed that "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). Thus, the "questions whether, to what extent, and for what time [Indians] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *United States v. Sandoval*, 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107 (1913).

Here, no party seeks to *compel* Congress to recognize the tribal status of Hawaiians. Instead, OHA argues that

if Congress has treated Hawaiians as a tribe, then under the authority of *Mancari*, OHA would have to demonstrate only a rational connection between its Hawaiian preferences and its programs. Plaintiffs argue that Congress' failure, so far, to recognize Hawaiians' tribal status does not *prevent* the courts from deciding whether OHA's Hawaiian-preference violates the Equal Protection Clause of the Fourteenth Amendment. Effectively, the district court found that it could not rule on the equal protection claim until it could determine the appropriate level of scrutiny, and it could not determine the level of scrutiny until Congress decided to grant or not to grant tribal status to Hawaiians.

Nothing in the claims Plaintiffs have asserted or the remedy they seek invites the district court to exercise powers reserved to Congress or to the President. The district court has not been asked to declare tribal status where Congress has declined. Instead, it is asked to interpret the implications of past congressional action or inaction for equal protection analysis. Indeed, courts are frequently called upon to "scrutiniz[e] Indian legislation to determine whether it violates . . . equal protection." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977). The fact that Congress enjoys "plenary power . . . in matters of Indian affairs 'does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny.'" *Id.* at 83-84, 97 S.Ct. 911 (quoting Brief of the Secretary of the Interior). In general, "the political question doctrine does not bar adjudication of a facial constitutional challenge even though Congress has plenary authority, and the executive has broad delegation, over Indian affairs." *Kahawaiolaa*, 386 F.3d at 1276.

In the exercise of its power to regulate commerce with Indians and recognize their sovereign status, Congress might be able to alter the relative burdens of proof and persuasion shouldered by Plaintiffs and OHA in this case.[5] But Congress has no obligation to exercise its Article I, Section 8, Clause 3 powers in any particular way. That it has, so far, declined to do so does not excuse the district court from hearing the case. Congress does not have a constitutionally committed power to set the level of scrutiny for those claiming native American status; it has the constitutionally committed authority to regulate affairs with native Americans, and the courts then determine which level of scrutiny is warranted by Congress' action or inaction. *See, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 882, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986); *United States v. Antelope*, 430 U.S. 641, 645-46, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977); *Mancari*, 417 U.S. at 553 n. 24, 94 S.Ct. 2474.

Moreover, we note that even if Congress had treated Hawaiians or native Hawaiians as a tribe, the district court would still have to determine whether OHA's classification was based on race or on tribal status. As we observed in *Kahawaiolaa*:

> As *Rice* illustrates, an "Indian tribe" may be classified as a "racial group" in particular instances. . . . We reject the notion that distinctions based on Indian or tribal status can never be

[5] We couch this in the conditional because the Court in *Rice* suggested that it remains "a matter of some dispute . . . whether Congress may treat the native Hawaiians as it does the Indian tribes." 528 U.S. at 518, 120 S.Ct. 1044. Like the Court, "[w]e can stay far off that difficult terrain" in this appeal. *Id.* at 519, 120 S.Ct. 1044.

> racial classifications subject to strict scrutiny. . . . Government discrimination against Indians based on race or national origin and not on membership or non-membership in tribal groups can be race discrimination subject to strict scrutiny.

386 F.3d at 1279 (citing *Adarand Constructors v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). This, too, is a determination properly left to the courts. *Id.*

The questions on which Plaintiffs have standing squarely and exclusively raise a Fourteenth Amendment claim. The courts must therefore determine the proper level of scrutiny. We do not require further action by Congress to inform that determination. To deny the federal courts their authority to adjudicate an equal protection claim simply because Congress expressed its intent with less than complete lucidity is to expand the political question doctrine beyond its historical limits. In doing so, it would restrict judicial authority in unprecedented ways; such an expansive interpretation subverts the very separation of powers that the political question doctrine is designed to protect. Although the Supreme Court was able to postpone consideration of those equal protection questions of "considerable moment and difficulty," *Rice*, 528 U.S. at 518-19, 120 S.Ct. 1044, we do not have that luxury. We therefore remand to the district court the issue whether the expenditure of state tax revenue on OHA programs violates the Equal Protection Clause of the Fourteenth Amendment.

VI. PLAINTIFFS' REMAINING MISCELLANEOUS ARGUMENTS

Plaintiffs make several additional arguments on appeal, none of which is meritorious. Plaintiffs contend that the district court erred in striking its Counter Motion for Summary Judgment of December 15, 2003. The district court cited multiple grounds in its December 16, 2003 unpublished Order for striking the motion, including: the motion was not a true counter motion because it raised numerous issues not raised in the motion which it purportedly countered; it was untimely; and the motion was not filed in the proper round of summary judgment rounds, as scheduled by the district court in a previous order.

We review for abuse of discretion challenges to pretrial management. *Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir.2001). "The district court is given broad discretion in supervising the pretrial phase of litigation." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir.1992) (citation and internal quotation marks omitted). Plaintiffs have not demonstrated that the district court's management of the summary judgment phase of this trial constituted an abuse of discretion. The district court's December 16, 2003 Order is affirmed. Similarly, we are unpersuaded by Plaintiffs' contention that the district court's pretrial management warrants the reassignment of this case to another judge and their request is denied.

Plaintiffs also appeal the district court's May 5, 2004 unpublished Order awarding roughly $5300 in costs to select defendants on the ground that imposing such costs will have a "chilling effect" on civil rights litigation. We review an award of costs for abuse of discretion. *Evanow v. M/V Neptune,* 163 F.3d 1108, 1113 (9th Cir.1998). Plaintiffs

have not demonstrated that the award of such modest costs, divided among multiple plaintiffs, constitutes an abuse of discretion. The district court's May 5, 2004 Order is affirmed.

Finally, Plaintiffs seek reversal of the district court's January 26, 2004 unpublished Order denying Plaintiffs' motion to compel discovery. A district court's discovery rulings are reviewed for an abuse of discretion. *United States v. Fisher*, 137 F.3d 1158, 1165 (9th Cir.1998). Again, we find no abuse of discretion, and the order is affirmed.

VII. CONCLUSION

The district court's orders are variously affirmed or reversed as follows.

Arakaki I, 198 F.Supp.2d 1165 (D.Haw.2002), is affirmed in part and reversed in part. We affirm the court's holding that Plaintiffs have standing to challenge the appropriation of state tax revenue to OHA. We reverse the holding that Plaintiffs have standing as taxpayers to challenge the appropriation of tax revenue to DHHL/HHC. We affirm the denial of standing to challenge the settlement of past claims against OHA. We affirm the denial of standing to challenge the issuance of bonds and the denial of standing to challenge all other spending that does not originate in tax revenue. The remaining issues addressed in that order are not on appeal.

Arakaki II, 299 F.Supp.2d 1090 (D.Haw.2002), is affirmed in part and reversed in part. We affirm Plaintiffs' standing to challenge the appropriation of state tax revenue to the OHA. We reverse the grant of standing to challenge the appropriation of tax revenue to DHHL/HHC.

We affirm the denial of standing to sue as trust beneficiaries. We affirm the denial of the motion to dismiss the tax revenue claim against OHA under the political question doctrine. We reverse the denial of the motion to dismiss the tax revenue claim against DHHL/HHC. The remaining issues in that order are not on appeal.

Arakaki III, 299 F.Supp.2d 1107 (D.Haw.2002), is affirmed on different grounds. *Arakaki* IV, 299 F.Supp.2d 1114 (D.Haw.2003), and *Arakaki* V, 299 F.Supp.2d 1129 (D.Haw.2003), are affirmed. *Arakaki* VI, 305 F.Supp.2d 1161 (D.Haw.2004), is reversed. All remaining orders in this case are affirmed.

The parties shall bear their own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

305 F.Supp.2d 1161

United States District Court,D. Hawai'i.
Earl F. ARAKAKI, et al., Plaintiffs,
v.
Linda LINGLE in her official capacity as Governor of the State of Hawaii, et al., Defendants.
No. CIV.02-00139 SOM/KSC.

Jan. 14, 2004.

H. William Burgess, Honolulu, HI, for Plaintiffs.

Mark J. Bennett, Attorney General, argued, State of Hawaii, Honolulu, HI, for Linda Lingle, State Officials, Hawaiian Homes Commissioners.

Sherry P. Broder, argued, Honolulu, HI, for Trustees of the Office of Hawaiian Affairs.

ORDER DISMISSING PLAINTIFFS' REMAINING EQUAL PROTECTION CLAIM

MOLLWAY, District Judge.

I. *INTRODUCTION.*

This is the latest in a long line of motions filed in this case. The historical background set forth in earlier orders is incorporated herein. Plaintiffs' sole remaining claim is Plaintiffs' Equal Protection challenge as state taxpayers to programs being administered by Defendant Office of Hawaiian Affairs ("OHA").

OHA was established in 1978 by a state constitutional amendment. *See* Haw. Const. art. XII, §§ 5-6. The purposes

of OHA include 1) bettering the condition of Hawaiians and native Hawaiians,[1] 2) serving as the principal state agency responsible for the performance, development, and coordination of programs and activities relating to Hawaiians and native Hawaiians; 3) assessing the policies and practices of other agencies affecting Hawaiians and native Hawaiians; 4) applying for, receiving, and disbursing grants and donations from all sources for Hawaiian and native Hawaiian programs and services; and 5) serving as a receptacle for reparations. Haw.Rev.Stat. § 10-3. It is undisputed that OHA administers programs for the benefit of all Hawaiians, not just native Hawaiians. It is also undisputed that OHA receives state tax appropriations. However, the extent of the taxes received by OHA and the exact nature of the programs benefitting Hawaiians have not been clearly established.

To the extent Plaintiffs are challenging OHA's use of state tax revenues to satisfy prerequisites for receiving matching federal funds, Plaintiffs lack standing to bring that challenge. Any such challenge necessarily challenges federal laws, and Plaintiffs' state taxpayer standing does not include standing to challenge any federal law. Accordingly, that claim is dismissed.

That leaves Plaintiffs' challenge to OHA's use of state tax revenues for programs not subject to federal matching

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[1] When referring to "Hawaiians" in this order, the court means any descendent of the aboriginal peoples inhabiting the Hawaiian Islands who exercised sovereignty and subsisted in the Hawaiian Islands prior to 1778. When referring to "native Hawaiians" in this order, the court means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778. To the extent Plaintiffs allege that OHA distributes funds solely to native Hawaiians, those claims have been dismissed.

fund provisions. OHA argues that this remaining claim should be dismissed because it presents a nonjusticiable political question. The political status of Hawaiians is currently being debated in Congress, and this court will not intrude into that political process. Accordingly, Plaintiffs' remaining Equal Protection claim is dismissed.

II. *STANDARD OF REVIEW.*

OHA's motion to dismiss is based on the political question doctrine. There is considerable debate about whether the political question doctrine is a jurisdictional or prudential limitation on this court. In *Hopson v. Kreps,* 622 F.2d 1375, 1378 (9th Cir.1980), the Ninth Circuit recognized this dispute:

> The government urges that the political question doctrine has prudential as well as Article III dimensions, and contends that its application involves a weighing of relevant considerations on a case-by-case basis. It asks us to sustain the decision of the district court on the basis of a finding that the court sensitively applied the well-known criteria enunciated in *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962), to the particular facts before us. We need not resolve the longstanding debate as to the nature and proper scope of the political question doctrine.

Id. (footnote omitted).

Some cases have considered the political question doctrine as going to this court's jurisdiction.

In *Flast v. Cohen, supra,* 392 U.S. 83, 95, 88 S.Ct. 1942, 1949, 20 L.Ed.2d 947, the Court noted that the

concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies both the standing and political question doctrines upon which petitioners in part rely. Each of these doctrines poses a distinct and separate limitation, *Powell v. McCormack,* 395 U.S. 486, 512, 89 S.Ct. 1944, 1959, 23 L.Ed.2d 491; *Baker v. Carr, supra*, 369 U.S. 186, 198, 82 S.Ct.691, 699, 7 L.Ed.2d 663, so that either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party.

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *accord Sierra Club v. Morton,* 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) ("Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, or to entertain 'friendly' suits, or to resolve 'political questions,' because suits of this character are inconsistent with the judicial function under Art. III.") (internal quotations omitted); *Koohi v. United States,* 976 F.2d 1328, 1337 (9th Cir.1992) (Kleinfeld, J., concurring) ("Both [the] political question doctrine and sovereign immunity go to jurisdiction."); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis,* 577 F.2d 1196, 1203 (5th Cir.1978) ("Throughout the history of the federal judiciary, political questions have been held to be nonjusticiable and therefore not a 'case or controversy' as defined by Article III.").

The Supreme Court has also noted, however, that the political question "doctrine has become a blend of constitutional requirements and policy considerations." *Flast v.*

Cohen, 392 U.S. 83, 95-97, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Accordingly, the Tenth Circuit has stated:

> Deeply rooted ambiguity in the nature and justification of the political question doctrine has prevented clear classification of the appropriate type of dismissal in political question cases. *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3534.3, at 517-525 (2d ed.1984). We agree with Wright & Miller's conclusion that, in the end, clear classification is immaterial: "[T]here is probably more room for confusion than benefit in attempting to analogize [political question dismissal] to dismissal for failure to state a claim, or to dismissal for lack of jurisdiction. Some cases will be appropriate for dismissal on the pleadings, others will require further development. . . ." *Id.* at 525; cf. Daniel O. Bernstine, *The Political Question Doctrine: A Perspective on its Procedural Ramifications,* 31 U. Kan. L.Rev. 115, 129-30 (1982) (concluding that dismissal for subject matter jurisdiction is appropriate if the claims fall within an established category of political questions or are frivolous, but that, otherwise, dismissal for failure to state a claim is appropriate).

Schroder v. Bush, 263 F.3d 1169, 1171, n. 1 (10th Cir.2001), *cert. denied,* 534 U.S. 1083, 122 S.Ct. 817, 151 L.Ed.2d 700 (2002); *accord Brown v. Hansen,* 973 F.2d 1118, 1121 (3d Cir.1992) ("The political question doctrine does not deprive courts of jurisdiction over a case.").

This court need not decide whether the present motion to dismiss based on the political question doctrine raises a jurisdictional issue that should be resolved under Rule 12(b)(1) or merely prudential concerns that should be resolved under Rule 12(b)(6). On the present motion, the

choice of rule does not affect the standard of review. Under either rule, this court, on the present motion, assumes the truth of Plaintiffs' factual allegations and determines whether, based on those allegations, the political question doctrine requires dismissal. *See Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa County,* 343 F.3d 1036, 1039 n. 1 (9th Cir.2003) ("because this case was considered by the district court under a Rule 12(b)(1) motion to dismiss, we assume the material facts alleged in the complaint are true"); *Shaver v. Operating Engineers Local 428 Pension Trust Fund,* 332 F.3d 1198, 1203 (9th Cir.2003) ("Since this is a 12(b)(6) motion, we assume that all the facts well pleaded in the complaint are true."); *Burke v. AT & T Tech. Servs. Co.,* 55 F.Supp.2d 432, 436 (E.D.Va.1999) (when examining "a motion to dismiss pursuant to Rule 12(b)(1), Fed.R.Civ.P., on the basis that the complaint, on its face, fails to state a basis for subject matter jurisdiction, the court assumes all facts in the complaint are true, thus providing the plaintiff with the same procedural protections as a Rule 12(b)(6) determination") (internal quotation omitted).

III. *POLITICAL QUESTION ANALYSIS.*

A. *Overview of the Political Question Doctrine.*

OHA argues that Plaintiffs' remaining Equal Protection claim challenging the provision of benefits to Hawaiians by OHA involves a nonjusticiable political question.[2]

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[2] Plaintiffs' state taxpayer standing is insufficient to support a challenge to OHA's expenditure of funds as a prerequisite to receiving matching federal funds. Any such challenge would require this court to review the federal law governing the matching funds, which this court cannot do based solely on state taxpayer standing. *See W. Mining*

(Continued on following page)

The political question doctrine bars this court's review of controversies that "revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Assoc. v. Amer. Cetacean Soc.*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986). On these matters, this court is "ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Id.* (quoting *United States ex rel Joseph v. Cannon*, 642 F.2d 1373, 1379 (1981)).

This court may dismiss an action on the ground that it involves a nonjusticiable political question when one of the following is "inextricable from the case":

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Council v. Watt, 643 F.2d 618, 631-32 (9th Cir.1981); *see also* Order Granting Defendants' Motions to Dismiss Plaintiffs' Claim Regarding the Hawaiian Home Lands Lease Program (Nov. 21, 2003) (filed in this action).

Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Id.* at 217, 82 S.Ct. 691; *United States v. Mandel,* 914 F.2d 1215, 1222 (9th Cir.1990) ("Implicating any one of these factors renders a question 'political' and thus nonjusticiable.").

Congress generally has been recognized as having plenary power to deal with the "special problems of Indians."[3] *Morton v. Mancari,* 417 U.S. 535, 552, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *accord South Dakota v. Yankton Sioux Tribe* 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."); *see also* Art. I, Section 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with . . . the

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[3] Congress has delegated at least some of its plenary power to legislate regarding federally recognized Indian tribes to the executive branch. 25 U.S.C. § 2 ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."); 25 U.S.C. § 9 ("The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs."); 43 U.S.C. § 1457 ("The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies: . . . 10. Indians.").

In 1978, the Department of the Interior promulgated regulations that govern the recognition of Indian tribes. *See* C.F.R. § 83.7. Hawaiians and native Hawaiians are not expressly recognized as Indians or Indian tribes under those regulations. *Id.*; *Kahawaiolaa v. Norton,* 222 F.Supp.2d 1213, 1219 (D.Haw.2002) ("Congress has not yet decided that it will deal with Native Hawaiians [sic] groups as political entities on a government-to-government basis.").

Indian Tribes"). This plenary power to legislate regarding federally recognized Indian tribes is based on a "history of treaties and the assumption of a 'guardian-ward' status." *Morton,* 417 U.S. at 552, 94 S.Ct. 2474.

Historically, Congress viewed Indians as weak, dependent upon and needing the protection of the United States government.

> These Indian tribes are the wards of the nation. They are communities dependent on the United States, – dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.
>
> . . . .
>
> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is [n]ecessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.

United States v. Kagama, 118 U.S. 375, 383-85, 6 S.Ct. 1109, 30 L.Ed. 228 (1886). In light of this paternalistic attitude, the Supreme Court has recognized that "Congress . . . has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage." *United States v. Sandoval,* 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107 (1913) (quoting *Tiger v. W. Inv. Co.,* 221 U.S. 286, 315, 31 S.Ct. 578, 55 L.Ed. 738 (1911)).

Accordingly, the political question doctrine has been found to bar a myriad of claims pertaining to Indians. In *Board of County Commissioners of Creek County v. Seber,* 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943), for example, the Supreme Court applied the political question doctrine to claims challenging a federal tax exemption for certain members of the Creek Tribe. *Id.* at 718, 63 S.Ct. 920 ("The fact that the Acts with-draw lands from the tax rolls and may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts."). The political question doctrine has also been applied to claims by native American groups that they should be recognized by the federal government. *See Miami Nation of Indians of Indiana v. United States Dept. of the Interior,* 255 F.3d 342, 345-46 (7th Cir.2001); *see also Cherokee Nation of Okla. v. Babbitt,* 117 F.3d 1489, 1496 (D.C.Cir.1997) ("Whether a group constitutes a 'tribe' is a matter that is ordinarily committed to the discretion of Congress and the Executive Branch, and courts will defer to their judgment."); *W. Shoshone Bus. Council v. Babbitt,* 1 F.3d 1052, 1057 (10th Cir.1993) ("The judiciary has

historically deferred to executive and legislative determinations of tribal recognition").

Indeed, the political question doctrine has been applied in this district to claims by native Hawaiians challenging the Department of the Interior's regulations pertaining to federal recognition of Indian tribes. *Kahawaiolaa v. Norton,* 222 F.Supp.2d 1213, 1219 (D.Haw.2002) (Kay, J.) ("Adjudication of Plaintiffs' claims would directly place the Court in the shoes of Congress and the Executive Branch in determining whether Native Hawaiians should be recognized and acknowledged as an Indian tribe."), *on appeal, see* 2003 WL 22670058 (May 15, 2003) (Appellee's Brief).

Although the power Congress has over Indian affairs is plenary, it is not absolute. *See Delaware Tribal Bus. Comm. v. Weeks,* 430 U.S. 73, 84, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977). Courts may scrutinize "Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment."[4] *Id.* In *Morton,* 417 U.S. at 555-56, 94 S.Ct. 2474 (1974), after applying a rational basis test to a Due Process Clause challenge, the Supreme Court upheld a preference given to members of federally recognized Indian tribes in their employment with the

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[4] On December 22, 2003, the day that OHA filed its Reply brief in support of its motion to dismiss, the Ninth Circuit filed its decision in *Artichoke Joe's California Grand Casino v. Norton,* 353 F.3d 712, 2003 WL 22998116, *20 (9th Cir. Dec.22, 2003) ("when a state law applies in Indian country as a result of the state's participation in a federal scheme that 'readjusts' jurisdiction over Indians, that state law is reviewed as if it were federal law"). Understandably, *Artichoke Joe's* was not discussed in any party's brief, although it was discussed at the hearing. The parties are reminded to comply with Local Rule 7.8 (regarding reliance at a hearing on authorities not cited in briefs).

Bureau of Indian Affairs.[5] However, the Court did not have before it any question as to whether the native Americans being given the preference were from federally recognized Indian tribes.

B. *Application of the Political Question Doctrine to This Action.*

On a previous motion, this court ruled that OHA had not met its burden of establishing that Plaintiffs' Complaint presented a nonjusticiable political question that required its dismissal.

The gist of the claims in the Complaint is that the benefits provided by OHA and HHC/DHHL are race-based, that those benefits should therefore be analyzed under the Equal Protection Clause to see whether they pass "strict scrutiny,"[6] and that the benefits should be stopped because they are not "narrowly tailored to further a compelling governmental interest." *See Shaw v. Reno,* 509 U.S. 630, 643, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Plaintiffs argue that the restriction of benefits to Hawaiians and

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[5] The preference at issue in *Morton* dated back to the Indian Reorganization Act of 1934, 417 U.S. at 542, 94 S.Ct. 2474, and predated the Department of the Interior's 1978 regulations regarding recognition of Indian tribes. *See* 25 C.F.R. § 83.7.

[6] The Equal Protection Clause provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. One of its central purposes is to prevent the states from purposefully discriminating among individuals on the basis of race. *Shaw v. Reno,* 509 U.S. 630, 642, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Governmental action can run afoul of the Equal Protection Clause when the government explicitly classifies or distinguishes among persons by reference to impermissible criteria such as race, sex, religion, or ancestry. *De La Cruz v. Tormey,* 582 F.2d 45, 49 (9th Cir.1978), *cert. denied,* 441 U.S. 965, 99 S.Ct. 2416, 60 L.Ed.2d 1072 (1979).

native Hawaiians is "presumptively invalid and can be upheld only upon an extraordinary justification." *See id.* at 643-44, 113 S.Ct. 2816.

Although most race-based preferences are subject to "strict scrutiny," preferences given to American Indian tribes are reviewed under the "rational basis" standard. *See Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). Defendants contend that this court should dismiss this action as involving a nonjusticiable political question because, in order to decide whether to apply the "strict scrutiny" or "rational basis" test, the court must decide what Defendants call the political question of whether Hawaiians and native Hawaiians are an "Indian tribe."

However, in the next breath, Defendants cite numerous cases that they say stand for the proposition that this court may apply a "rational basis" test without finding that Hawaiians and native Hawaiians are actually an "Indian tribe." *See* Office of Hawaiian Affairs Defendants' Supplemental Memorandum in Response to Questions Raised by the Court at the April 29, 2002 Hearing (filed April 29, 2002). For example, in *Alaska Chapter, Assoc. Gen. Contractors of Amer., Inc. v. Pierce,* 694 F.2d 1162 (9th Cir.1982), the Ninth Circuit applied the *Morton* analysis to benefits being provided to the indigenous people of Alaska. At the time *Pierce* was decided, those indigenous people had not been recognized by the Bureau of Indian Affairs as being "Indian tribes." *See* Bureau of Indian Affairs, Indian Tribal Entities That Have a Government-to-Government Relationship With the United States, 46 Fed. Regis. 35360 (1981). Nevertheless, *Pierce* applied the *Morton* analysis broadly, employing a rational basis test to benefits being provided to "any person recognized as being an Indian or

Alaskan Native by a tribe, the Government, or any state." *Pierce,* 694 F.2d at 1168 n. 8. *Pierce* reasoned that, although the history of "Alaskan Natives" with the United States was different from that of "American Indians," the *Morton* analysis nevertheless applied because "Alaskan Natives" "have been considered to have the same status as other federally recognized American Indians." "Alaskan Natives" were "under the guardianship of the federal government and entitled to the benefits of the special relationship." *Id.* n. 10.

Pierce indicates that a court may decide the applicability of the *Morton* analysis without deciding the alleged political question of whether a group is an "Indian tribe." Accordingly, OHA has not met its burden of demonstrating that a nonjusticiable political question requires dismissal of this action. The court is not here deciding that it will apply a "rational basis" test. The court recognizes that Plaintiffs are arguing that *Pierce* has been called into doubt by *Rice v. Cayetano,* 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000). However, OHA's present motion is a motion to dismiss based on nonjusticiability; this motion does not require the court to determine what test it will apply if it examines the merits of Plaintiffs' claims. On OHA's nonjusticiability motion, the court instead rests its decision on OHA's failure to meet its burden of establishing that Plaintiffs present a nonjusticiable question requiring dismissal.

Order Granting in Part and Denying in Part Motions to Dismiss on Standing Grounds; Order Denying Motion to Dismiss (Or Reconsider Prior Order Finding Taxpayer Standing) on Political Question Grounds (May 8, 2002) at 28-31 (footnote omitted).

In the present motion, OHA claims that it is not arguing that a political question exists as to whether Congress has recognized or should recognize Hawaiians as Indians. Instead, OHA essentially assumes that Hawaiians have been so recognized and argues that the political question doctrine prevents this court's review of how Congress chooses to provide benefits to native, indigenous people like Hawaiians.

Plaintiffs oppose the present motion by contending that it is an untimely motion for reconsideration. This court disagrees. The denial of OHA's previous motion merely stated that OHA had not met its burden of demonstrating it was entitled to summary judgment, not that the political question doctrine was inapplicable. OHA's earlier political question motion was denied because the cursory discussion of the doctrine in the midst of a discussion of many other issues did not sufficiently address the applicability of that doctrine to federal recognition of both Hawaiians and native Hawaiians in light of *Alaska Chapter, Associated General Contractors of America, Incorporated v. Pierce,* 694 F.2d 1162 (9th Cir.1982). OHA's present motion is devoted to the political question issue and does not merely rehash its earlier submission.

Plaintiffs' remaining claim does not challenge the provision of benefits to native Hawaiians (as some of Plaintiffs' other claims did). Accordingly, this court need not decide whether Congress has recognized and conferred benefits on native Hawaiians, as opposed to Hawaiians, through legislation such as the Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108, which, as with much of the Indian legislation passed by Congress, had as its purpose the rehabilitation of a native population. *Rice v. Cayetano,* 528 U.S. 495, 507, 120 S.Ct. 1044, 145 L.Ed.2d

1007 (2000); *see also* H.R.Rep. No. 839 at 2 (1920). Instead, the remaining issue before this court relates to whether Hawaiians have been recognized by Congress in a manner requiring this court to analyze OHA's programs under the rational basis test set forth in *Morton*.

OHA's political question argument is consistent with *Sandoval*, in which the Supreme Court noted that it is for Congress (not the courts) to determine the questions of whether, to what extent, and for how long the guardian-ward relationship between the United States government and Indian tribes exists. *Sandoval*, 231 U.S. at 46, 34 S.Ct. 1. However, Plaintiffs are not really seeking to disturb or alter the benefits being conveyed on Hawaiians. Instead, they are claiming that their constitutional rights are being violated by the state's restriction of those benefits to Hawaiians. Plaintiffs' claim is therefore similar to the claim asserted in *Morton*, in which the Supreme Court examined Indian legislation using a rational basis standard. *Morton* establishes, contrary to OHA's contention, that, under some circumstances, courts may review the provision of benefits to native groups.

Although OHA says that its motion does not argue that there is a political question as to whether Hawaiians have been treated by Congress as equivalent to Indians for purposes of the *Morton* analysis, that question is inextricably intertwined with OHA's argument that this court cannot review the choice Congress has made as to how best to provide benefits to Hawaiians. OHA's argument is premised on congressional recognition of Hawaiians and

cannot be addressed without first determining whether that premise is viable.[7]

Plaintiffs' remaining claim is not a challenge to benefits being provided to native Hawaiians under the HHCA.[8] Instead, the remaining issue in this case involves preferences given to Hawaiians (i.e., people of Hawaiian

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[7] Plaintiffs argue that there is no political question in this case because *Morton* is inapplicable. Plaintiffs argue that, under *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000), and another recent district court order pertaining to OHA elections, *see Arakaki v. Hawaii*, Civil No. 00-514 HG/BMK, slip op. (D.Haw. Aug. 22, 2003), the benefits being provided to Hawaiians by OHA are race-based. Those cases are distinguishable, as they involved race-based challenges to elections under the Fifteenth Amendment, not preferences and/or benefits being provided to native populations allegedly based on their political, as opposed to racial, status. Moreover, Plaintiffs cite no clear authority indicating that *Morton* is no longer good law. The Supreme Court could have very easily ruled in *Rice* that *Morton* no longer applies, rather than stating that it would tread on "difficult terrain" if it had to determine whether native Hawaiians should be treated as Indians under *Morton*. As the Supreme Court did not overrule *Morton*, that case appears to remain good law.

[8] If Plaintiffs had remaining claims challenging benefits being provided to native Hawaiians pursuant to the HHCA, Plaintiffs might be correct in arguing that the political question doctrine does not bar review of the challenge. As in *Morton*, a constitutional challenge to the HHCA would involve the examination of legislation from the earlier part of the twentieth century (before the Department of the Interior issued regulations regarding recognition of Indian tribes) that conveyed benefits on native groups recognized by Congress at that time as needing those benefits. It would make little sense to say that native Hawaiians are not federally recognized under the 1978 Department of the Interior's regulations, as Congress itself appears to have recognized native Hawaiians as needing the United States' protection when the HHCA was enacted many years before. Thus, now-Chief Judge David A. Ezra determined that the court could review such a matter, but that the native Hawaiian preference provided for in the HHCA does not create a suspect classification and that the *Morton* analysis applies to that preference. *See Naliielua v. Hawaii*, 795 F.Supp. 1009, 1013 (D.Haw.1990).

ancestry with no limitation on blood quantum) by OHA. To determine the level of scrutiny applicable to these preferences, this court must determine whether Hawaiians should be treated as federally recognized such that the *Morton* analysis is applicable. On this point, notwithstanding OHA's argument, Congress has sent mixed signals.

C. *Because Congress Has Sent Mixed Signals as to The Political Status of Hawaiians, and That Status is Currently Being Debated in Congress, the Political Status of Hawaiians is a Political Question.*

Historically, Congress did not provide for benefits to Hawaiians. *See, e.g.,* HHCA (limiting benefits to native Hawaiians). More recently, however, Congress has begun to provide benefits to Hawaiians in certain contexts. In the "Native Hawaiian Education Act," 20 U.S.C. §§ 7511 to 7517, for example, Congress attempts to "authorize and develop innovative educational programs to assist Native Hawaiians." *See* 20 U.S.C. § 7513(1). These programs include grants benefitting "Native Hawaiians." *See* 20 U.S.C. § 7515(a). For purposes of the "Native Hawaiian Education Act," "Native Hawaiian" is defined without regard to Hawaiian blood quantum. 20 U.S.C. § 7517(A)(B) ("Native Hawaiian" is any "descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii"). In the education context, District Judge Alan C. Kay has identified a special trust relationship recognized by Congress in the "Native Hawaiian Education Act." *See John Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate,* 295 F.Supp.2d 1141, 1168-1174 (D.Haw.2003).

Similarly, Congress has recently enacted the "Native Hawaiian Health Care Act of 1988," 42 U.S.C. §§ 11701-11714. For purposes of this act, "Native Hawaiians" is defined broadly to include all Hawaiians. *See* 42 U.S.C. § 11711(3) (defining "Native Hawaiians" as people who are citizens of the United States and descendants "of the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii."). In the "Native Hawaiian Health Care Act of 1988," Congress declared:

> [I]t is the policy of the United States in fulfillment of its special responsibilities and legal obligations to the indigenous people of Hawaii resulting from the unique and historical relationship between the United States and the Government of the indigenous people of Hawaii –
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> (1) to raise the health status of Native Hawaiians to the highest possible health level; and
>
> (2) to provide existing Native Hawaiian health care programs with all resources necessary to effectuate this policy.

42 U.S.C. § 11702(a).

In the "Native Hawaiian Health Care Act of 1988," Congress made legislative findings that Hawaiians were indigenous to Hawaii, 42 U.S.C. § 11701(1); that there was a trust relationship between the government and native Hawaiians, 42 U.S.C. § 11702(13); and that this "historical and unique legal relationship has been consistently recognized and affirmed by the Congress through the enactment of Federal laws which extend to the Hawaiian people the same rights and privileges accorded to American Indian,

Alaska Native, Eskimo, and Aleut communities," 42 U.S.C. § 11702(19).

Congress has also recognized the "unique relationship" the United States has with Hawaiians in the "Native American Graves Protection and Repatriation Act," 25 U.S.C. §§ 3001-3013. For example, 25 U.S.C. § 3010 states: "This chapter reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government." For purposes of the "Native American Graves Protection and Repatriation Act," "Native Hawaiian" means "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." 25 U.S.C. § 3001(10).

Although Congress has enacted legislation that appears to equate Hawaiians to Indians and/or Indian tribes in some contexts, Congress has not yet passed the "Akaka Bill," which has been pending before Congress for several years and purports to express the policy of the United States with respect to the United States' relationship with "Native Hawaiians," defined by the Akaka Bill without reference to blood quantum. S. 344, 108th Cong. § 2 (2003) (in pertinent part, defining, "Native Hawaiians" as including "the indigenous, native people of Hawaii who are the direct lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893. . . .").

Congress may have recognized Hawaiians as being in need of certain preferences in some contexts, but it has not

yet clearly recognized Hawaiians as being equivalent to Indians or Indian tribes for purposes of the *Morton* analysis as to all benefits being provided to Hawaiians. Whether Hawaiians should be treated as being recognized by Congress such that the more lenient review standard found in *Morton* should be applied to Plaintiffs' Equal Protection challenge to programs being administered by OHA is an issue that is a nonjusticiable political question. As stated by Judge Kay in *Kahawaiolaa,* such a determination involves matters that have been constitutionally committed to the other branches and would show a lack of respect to those branches *Kahawaiolaa,* 222 F.Supp.2d at 1219.

D. *Case Precedent Does Not Clearly Establish the Political Status of Hawaiians.*

The court recognizes that there are indeed circumstances in which courts can determine whether a native, indigenous group should be treated as equivalent to Indians for purposes of the *Morton* analysis. In *Pierce,* for example, the Ninth Circuit applied *Morton*'s rational basis standard in reviewing a preference being provided to Alaskan natives. Based on Supreme Court and Ninth Circuit precedent, *Pierce* held that Alaskan natives, despite the differences in their history from that of Indians, were "under the guardianship of the federal government and entitled to the benefits of the special relationship." *Pierce,* 694 F.2d at 1169 n. 20. But *Pierce* is limited to its facts. Although *Pierce* indicates that a court can sometimes determine whether a native, indigenous people should be treated like an Indian tribe for purposes of the *Morton* analysis, *Pierce* does not stand for the proposition that the courts always have that ability. In the

present case, Congress is still speaking on the issue. It is precisely that circumstance that distinguishes *Pierce* from this case. The political process had progressed further in *Pierce* than it has here. The intent of Congress as to Hawaiians is not presently as clear as it was with respect to the Alaskan natives in *Pierce*. As Judge Kay recognized in *Kahawaiolaa*, Congress has begun to include Hawaiians as beneficiaries in bills providing services to Native Americans, although Hawaiians are not classified as Indians and have not been dealt with comprehensively by Congress. *Kahawaiolaa*, 222 F.Supp.2d at 1220 n. 9.

Of course, had Congress been long silent on the issue, the absence of express recognition by Congress of Hawaiians as equivalent to an Indian tribe would doubtless indicate that Hawaiians are not equivalent. A party challenging a classification may normally rely on such silence as indicating that a preference does not fall under the *Morton* analysis. But Congress is not silent here. It is speaking, but what it will conclude is unclear. It is in recognition of the continuing debate in Congress that this court defers to Congress.

The court notes that, although Judge Kay held that "Congress has not yet decided that it will deal with Native Hawaiians [sic] groups as political entities on a government-to-government basis," *Kahawaiolaa*, 222 F.Supp.2d at 1219, he also stated in dicta that the rational basis standard announced in *Morton* applied to benefits being provided to "Native Hawaiians." *Kahawaiolaa*, 222 F.Supp.2d at 1223 n. 14. It is not entirely clear whether Judge Kay was using the term "Native Hawaiians" to refer to persons with a certain blood quantum. This court declines to make any pronouncement at this time concerning the level of scrutiny applicable to Hawaiians (that is,

leaving blood quantum aside). This court does not mean to indicate that it either agrees or disagrees with footnote 14 of *Kahawaiolaa* if it applies generally to Hawaiians, which is the group for which OHA provides benefits. Rather, this court's position is that this is a political issue that should be first decided by another branch of government.

In *Rice v. Cayetano,* 146 F.3d 1075, 1081 (9th Cir.1998), the Ninth Circuit recognized that "the special treatment of Hawaiians and native Hawaiians reflected in establishment of trusts for their benefit, and the creation of OHA to administer them, is similar to the special treatment of Indians that the Supreme Court approved in *Morton.*" *Id.* However, when the Supreme Court reversed the Ninth Circuit, it noted that "[i]t is a matter of some dispute . . . whether Congress may treat the native Hawaiians as it does Indian tribes." The Supreme Court said it "could stay far off that difficult terrain." *Rice,* 528 U.S. at 519, 120 S.Ct. 1044. Accordingly, the Supreme Court decision in *Rice* supports the proposition that another branch of government should make the decision as to whether Hawaiians should be treated as Indians for purposes of the *Morton* analysis.

IV. *CONCLUSION.*

OHA's motion to dismiss is granted. Because no claims remain for adjudication, the Clerk of the Court is directed to enter final judgment in favor of the Defendants and to close this case.

IT IS SO ORDERED.

299 F.Supp.2d 1129

United States District Court, D. Hawai'i.
Earl F. ARAKAKI, et al., Plaintiffs,
v.
Linda LINGLE in her official capacity as Governor of the State of Hawaii, et al., Defendants.

Civil No. 02-00139 SOM/KSC.

Dec. 9, 2003.

H. William Burgess, Honolulu, HI, for plaintiff.

Mark Bennett, Charlene M. Aina, Gerard D. Lau, Attorney General, Thomas A. Helper, U.S. Attorney's Office, Sherry P. Broder, Robert G. Klein, McCorriston MillerMukai MacKinnon, Honolulu, HI, for defendant.

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DISMISSING CLAIMS AGAINST HHCA/DHHL DEFENDANTS

MOLLWAY, District Judge.

I. *INTRODUCTION.*

On November 21, 2003, 2003 WL 23177409 this court reiterated that Plaintiffs' limited state taxpayer standing only allows them to challenge the state law underlying the expenditure of state taxes. The court then ruled that Plaintiffs' state taxpayer standing did not provide them with standing to challenge a federal law. Because state taxpayer standing is too limited to permit a challenge to a federal law, the court held that it did not allow Plaintiffs to challenge the Hawaiian Home Lands lease program, mandated by both state and federal law. *See W. Mining Council v. Watt,* 643 F.2d 618, 631-32 (9th Cir.1981). On

December 8, 2003, Plaintiffs filed a motion for reconsideration of that holding. Plaintiffs' motion for reconsideration fails to demonstrate a manifest error of law or fact, and it is denied.

II. *STANDARD OF REVIEW.*

Three grounds justify reconsideration of an order: (i) an intervening change in controlling law, (ii) the availability of new evidence, and (iii) the need to correct clear error or prevent manifest injustice. *All Hawaii Tours v. Polynesian Cultural Ctr.,* 116 F.R.D. 645, 649 (D.Haw.1987), *rev'd in part on other grounds,* 855 F.2d 860, 1988 WL 86203 (9th Cir.1988); *see also* Local Rule 60.1 (allowing reconsideration based on: (a) the discovery of new material facts not previously available; (b) an intervening change in the law; or (c) a manifest error of law or fact). In this motion, Plaintiffs claim that the court's earlier ruling was a manifest error.

III. *ANALYSIS.*

This court previously ruled that Plaintiffs' limited state taxpayer standing was insufficient to give them standing to challenge a federal law. Relying solely on *Green v. Dumke,* 480 F.2d 624 (9th Cir.1973), Plaintiffs contend that this ruling is a manifest error. Plaintiffs' reliance on *Green* is misplaced.

Green did not arise in the state taxpayer standing context. Instead, the plaintiff in *Green* lost federal grants and loans when a college determined that he was disqualified from receiving student benefits under the 1968 Federal Higher Education Act Amendments, 20 U.S.C. § 1060(a). *Id.* at 626. In *Green* the college argued that, for

purposes of § 1983, it was not acting under color of state law when it acted pursuant to that federal statute. *Id.* at 628. *Green* held that, notwithstanding the federal statute, the college was acting under color of state law. *Id.* at 629.

This court did not hold that a plaintiff could never challenge the Hawaiian Home Lands Lease Program. In fact, the court stated:

> By this order, the court is not ruling that the Admission Act can never be challenged. The court can certainly envision claimants with standing to challenge the Admission Act, but any such claimant must have more than state taxpayer status. Such a claimant could possibly include, for example, someone who applied for a Hawaiian Home Lands lease and was turned down solely because he or she was not native Hawaiian. No Plaintiff in this case has shown any such standing.

Order Granting Defendants' Motions to Dismiss Plaintiffs' Claim Regarding the Hawaiian Home Lands Lease Program (Nov. 21, 2003) at 6. Plaintiffs' remaining claims were based on state taxpayer standing. Plaintiffs' Hawaiian Home Lands Lease Program claims were dismissed because their state taxpayer standing was insufficient to challenge both the federal and state requirements of that program. Unlike *Green,* Plaintiffs' claims were not dismissed based on an alleged lack of action under color of state law. Because *Green* in no way expanded the scope of state taxpayer standing, *Green* is inapposite and Plaintiffs fail to demonstrate a manifest error of law or fact justifying reconsideration.

IV. *CONCLUSION.*

Plaintiffs' motion for reconsideration is denied.

IT IS SO ORDERED.

299 F.Supp.2d 1114

United States District Court, D. Hawai'i.
Earl F. ARAKAKI, et al., Plaintiffs,
v.
Linda LINGLE in her official capacity as Governor of the State of Hawaii, et al., Defendants.

Civil No. 02-00139 SOM/KSC.

Nov. 21, 2003.

H. William Burgess, Honolulu, HI, for Plaintiffs.

Mark J. Bennett, Attorney General, Honolulu, HI, for Linda Lingle, State Officials, Hawaiian Homes Commissioners.

Steven Miskinis, U.S. Attorney's Office, Honolulu, HI, for United States of America.

Sherry P. Broder, Honolulu, HI, for Trustees of the Office of Hawaiian Affairs.

Robert G. Klein, McCorriston MillerMukai MacKinnon, Honolulu, HI, for Defendant-Intervenor SCHHA.

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF STANDING ORDERS; ORDER DENYING PLAINTIFFS' RULE 54(b) REQUEST; ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' CLAIM REGARDING THE HAWAIIAN HOME LANDS LEASE PROGRAM; ORDER DENYING REMAINDER OF DEFENDANTS' MOTIONS; ORDER DENYING THE UNITED STATES' MOTION TO STRIKE; ORDER TO SHOW CAUSE WHY THE CLAIMS OF SANDRA BURGESS, DONNA SCAFF, AND EVELYN ARAKAKI SHOULD NOT BE DISMISSED

MOLLWAY, District Judge.

I. *INTRODUCTION.*

The court's earlier rulings have left Plaintiffs with two claims based only on Plaintiffs' status as state taxpayers. One claim seeks to enjoin the State of Hawaii from appropriating state tax revenue for the Hawaiian Home Lands lease program administered by the Department of Hawaiian Homelands ("DHHL"), which is headed by an executive board known as the Hawaiian Homes Commission (comprised of Defendants Micah Kane, Wonda Mae Agpalsa, Henry Cho, Thomas P. Contrades, Quentin Kawananakoa, Herring K Kalua, Milton Pa, and John A.H. Tomoso) (collectively "HHC"). Plaintiffs' other claim seeks to enjoin the state from appropriating state tax revenue for programs administered by the Office of Hawaiian Affairs and its trustees, Defendants Haunani Apoliona, Rowena Akana; Donald B. Cataluna; Linda Dela Cruz; Dante Carpenter; Colette Y.P. Machado; Boyd P. Mossman; Oswald Stender; and John D. Waihe'e, IV (collectively "OHA").[1]

The court was scheduled to hear a first round of summary judgment motions concerning these two claims on September 8, 2003.[2] However, after the Ninth Circuit issued its decision in *Carroll v. Nakatani,* 342 F.3d 934 (9th Cir.2003), on September 2, 2003, the court vacated its earlier order dismissing the United States so that the

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[1] No Defendant has previously disputed that the State of Hawaii appropriates tax revenue for programs administered by DHHL/HHC and OHA. Nor have Plaintiffs established an actual link between state tax appropriations and any of those programs.

[2] The September 8, 2003, hearing date was itself a continuation of an earlier hearing date that was postponed when one of Plaintiffs' attorneys unexpectedly became ill and then passed away.

impact, if any, of *Carroll* on claims against the United States could be discussed. The court then conducted a status conference on September 8, 2003, instead of a hearing on summary judgment motions.

At the status conference on September 8, 2003, the court scheduled a hearing on motions that the parties were invited to file based on *Carroll:*

> We're going to have a hearing on November 17th. Any party may bring a motion that is confined to the impact, if any, of the *Carroll* decision on this case. So to the extent any party thinks that I should dismiss it or put something back in to the case that was dismissed, you have to bring a motion to that effect.

Transcript of Proceedings (Sept. 8, 2003) at 42. Five motions claiming to be based on *Carroll* were filed on October 14, 2003, 80 Fed.Appx. 552. In a sixth motion, the United States seeks to strike portions of Plaintiffs' reply in support of Plaintiffs' motion.

In the first motion, Plaintiffs ask this court to vacate the restrictions placed on Plaintiffs' standing in the court's earlier orders. Plaintiffs' motion is not one made necessary or appropriate by *Carroll.* The court deems Plaintiffs' motion to be one for reconsideration and denies the motion because it does not satisfy any condition for reconsideration. The court also denies Plaintiffs' alternative request for Rule 54(b) certification of the court's earlier decision limiting claims to those based on state taxpayer standing.

The second through fifth motions raise issues related to each other. In the second motion, the United States moves for dismissal, asserting that Plaintiffs lack standing to sue the United States. The United States argues that

Carroll does nothing to affect the correctness of the court's earlier dismissal.

In the third motion, DHHL/HHC argues that, because Plaintiffs lack standing to pursue claims against the United States, Plaintiffs' claims challenging the Hawaiian Home Lands lease program created by the Hawaiian Homes Commission Act ("HHCA") must be dismissed. Under *Carroll,* the United States is a necessary party to such a challenge, but, the motion argues, Plaintiffs' state taxpayer standing does not give Plaintiffs standing to challenge the federal law that is a necessary part of any challenge to the Hawaiian Home Lands lease program.

In the fourth motion, OHA similarly argues that, under *Carroll,* the United States is an indispensable party to any challenge to the Hawaiian Home Lands lease program. OHA argues that, because Plaintiffs lack standing to bring suit against the United States, Plaintiffs' Hawaiian Home Lands lease program claims must be dismissed. OHA also argues that Plaintiffs lack standing to pursue their claims against OHA because those claims involve an analysis of the public land trust created by the Admission Act.

In the fifth motion, Defendants-Intervenors State Council of Hawaiian Homestead Association and Anthony Sang, Sr. (collectively "SCHHA"), argue that Plaintiffs' challenge to the Hawaiian Home Lands lease program is a nonjusticiable political question. SCHHA also contends that, under *Carroll,* Plaintiffs lack standing to pursue that claim.

The sixth motion, a motion to strike filed by the United States on November 7, 2003, argues that Plaintiffs'

reply in support of Plaintiffs' motion raises issues in an untimely manner.

In this order, the court reiterates that state taxpayer standing only allows a plaintiff to challenge the state law underlying the expenditure of state taxes. The court has already ruled that state taxpayer status does not provide standing to challenge state statutes to the extent they do not involve state tax revenue. Thus, Plaintiffs' state taxpayer status does not allow Plaintiffs to challenge spending by DHHL/HHC and/or OHA that involves rental income or other money not derived from state tax revenue. Any success Plaintiffs may have in this lawsuit, therefore, will fall short of closing down entirely either DHHL/HHC or OHA, as neither relies entirely on state tax revenue.

Carroll teaches that any challenge to the lessee requirements of the Hawaiian Home Lands lease program necessarily involves a challenge to the Admission Act, which is a federal law. The court therefore grants Motions 2 through 5 in part, dismissing Plaintiffs' claim challenging the Hawaiian Home Lands lease program based on lack of standing. State taxpayer standing is too limited to permit a challenge to a federal law and therefore does not allow Plaintiffs to challenge the Hawaiian Home Lands lease program, which is mandated by both state and federal law. *See W. Mining Council v. Watt*, 643 F.2d 618, 631-32 (9th Cir.1981). This means that the United States, DHHL/HHC, SCHHA, and Defendant-Intervenors Hui Kako'o 'Aina Ho'opulapula, Blossom Feiteira, and Dutchy Saffery (collectively "Hui Defendants") are dismissed from this case.

By this order, the court is not ruling that the Admission Act can never be challenged. The court can certainly

envision claimants with standing to challenge the Admission Act, but any such claimant must have more than state taxpayer status. Such a claimant could possibly include, for example, someone who applied for a Hawaiian Home Lands lease and was turned down solely because he or she was not native Hawaiian. No Plaintiff in this case has shown any such standing.

The court denies the other portions of Motions 2 through 5. That is, the court rejects as moot OHA's argument that the United States is a necessary party to Plaintiffs' challenge to the use by OHA of ceded land revenue. Because state taxpayer standing does not extend to any challenge to use of revenue that is not tax revenue, the issue of who is a necessary party to any such challenge need not be addressed. The court has already ruled that Plaintiffs may not proceed on the basis that they are the beneficiaries of a public land trust. On this record, the court does not find persuasive OHA's contention that appropriations of state tax revenues for OHA are somehow required by the Admission Act. To the extent SCHHA argues that Plaintiffs' claims raise a political question, the court concludes that this argument does not arise as a result of the *Carroll* decision and is therefore beyond the scope of the current motions. Although the political question argument may possibly be raised by some party in another round of motions, presumably in a form different from the form already rejected by this court in an earlier order, that argument is premature given the schedule of motions instituted by this court.

Finally, because the claim against the United States has been dismissed, the court denies the United States' motion to strike (filed November 7, 2003) as moot.

II. *STANDARD OF REVIEW.*

The standard of review for motions to dismiss has been set forth in this court's previous orders. That standard is incorporated herein by reference.

III. *HISTORICAL BACKGROUND.*

The background of this case has been set forth in this court's previous orders. It is restated herein only to provide context to the present motions.

A. *DHHL/HHC's Hawaiian Home Lands Lease Program.*

In 1921, Congress enacted the HHCA, 42 Stat. 108, setting aside about 200,000 acres of land ceded to the United States by the Republic of Hawaii and creating a program of loans and long-term leases for the benefit of "native Hawaiians."[3] *Rice v. Cayetano*, 528 U.S. 495, 507, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000).

In the Admission Act, Congress imposed certain requirements on Hawaii as conditions of statehood. *See* P.L. 86-3, § 4 (March 18, 1959), *reprinted in* 73 Stat. 4, 5 ("Admission Act"). Pursuant to the Admission Act, Hawaii agreed in 1959 to adopt the HHCA as part of its constitution. Haw. Const. art. XII, §§ 2-3. Except for property kept

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[3] As used in the HHCA and this order, "native Hawaiians" means "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." 42 Stat. 108; *Rice*, 528 U.S. at 507, 120 S.Ct. 1044. The Hawaii Legislature has since provided that successors to the original native Hawaiian lessees under the HHCA only need to be at least one-quarter Hawaiian. *See* Hawaii Homes Commission Act § 209 (Michie 2003).

by the United States, the Admission Act granted Hawaii title to all the public lands and property within the boundaries of the State of Hawaii that were previously held by the United States, including the land subject to the HHCA. Admission Act, § 5(b); *Rice,* 528 U.S. at 507, 120 S.Ct. 1044. As required by the Admission Act, these public lands, as well as the proceeds and income therefrom, are now held by Hawaii "as a public trust."[4] Admission Act, § 5(f); Haw. Const. art. XII, § 4; *Rice,* 528 U.S. at 507-08, 120 S.Ct. 1044. The Admission Act requires this "public trust" to be used for one or more of the following purposes:

> [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, [5] and for the provision of lands for public use.

73 Stat. at 6; *see also Price v. Akaka,* 3 F.3d 1220, 1222 (9th Cir.1993), *cert. denied,* 511 U.S. 1070, 114 S.Ct. 1645, 128 L.Ed.2d 365 (1994). As state taxpayers, Plaintiffs allege that, pursuant to the HHCA, DHHL/HHC runs a Hawaiian Home Lands lease program for the benefit of native Hawaiians and that this lease program violates their rights under the Equal Protection Clause. *See* Complaint (March 4, 2002) ¶ 2.

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[4] DHHL/HHC manages the 200,000 or so acres set aside for the benefit of native Hawaiians under the HHCA. *See* Haw.Rev.Stat. §§ 10-3(3), 26-17.

In section 4 of the Admission Act, the United States reserved to itself the right to consent to any changes in "the qualifications of lessees" under the Hawaiian Home Lands lease program. Pub.L. 86-3, § 4.

B. *OHA.*

In 1978, OHA was established by a state constitutional amendment. *See* Haw. Const. art. XII, §§ 5-6. The purposes of OHA include 1) bettering the condition of Hawaiians[5] and native Hawaiians, 2) serving as the principal state agency responsible for the performance, development, and coordination of programs and activities relating to Hawaiians and native Hawaiians; 3) assessing the policies and practices of other agencies affecting Hawaiians and native Hawaiians; 4) applying for, receiving, and disbursing grants and donations from all sources for Hawaiian and native Hawaiian programs and services; and 5) serving as a receptacle for reparations. Haw.Rev.Stat. § 10-3. It is undisputed that OHA runs a variety of programs for the benefit of Hawaiians and native Hawaiians. As state taxpayers, Plaintiffs allege that the provision of benefits by OHA to only Hawaiians and native Hawaiians violates Plaintiffs' rights under the Equal Protection Clause.

[5] As used in the chapter governing OHA and in this order, "Hawaiian" does not refer to a person of any particular blood quantum and instead means "any descendent of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw.Rev.Stat. § 10-2.

IV. *ANALYSIS.*

A. *The Carroll Decision.*

On September 2, 2003, the Ninth Circuit issued its decision in *Carroll*. *Carroll* involved consolidated challenges under the Equal Protection Clause to OHA and the Hawaiian Home Lands lease program administered by DHHL/HHC. The motions filed on October 14, 2003, were required to be limited to a discussion of whether *Carroll* affects this case. The court therefore begins with an examination of *Carroll*.

In *Carroll*, the Ninth Circuit held that Patrick Barrett lacked standing to claim that OHA's business loan program was racially discriminatory. The Ninth Circuit concluded that Barrett lacked an injury sufficient to give him such standing, as Barrett failed to demonstrate that he was ready and able to compete for an OHA loan. Barrett had submitted to OHA only a symbolic, incomplete loan application, which was returned to him with a note requesting that it be completed and resubmitted to OHA. Barrett had not formulated a business plan or even researched necessary business expenses, making him unable to compete for OHA's business loans. *Carroll*, 342 F.3d at 941-42. The Ninth Circuit concluded that Barrett presented only generalized grievances against OHA that he lacked standing to bring. *Id.* at 943; *see also United States v. Hays*, 515 U.S. 737, 743, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (the "rule against generalized grievances applies with as much force in the equal protection context as in any other"); *Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (the Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court").

With respect to Barrett's challenge to the Hawaiian Home Lands lease program, the Ninth Circuit held that Barrett satisfied the injury-in-fact prong of the standing analysis because he had applied for a Hawaiian Home Lands lease.[6] *Id.* The Ninth Circuit concluded, however, that Barrett's challenge to the Hawaiian Home Lands lease program was not redressable. *Carroll,* 342 F.3d at 944. The Ninth Circuit reasoned that the Hawaiian Home Lands lease program could not be challenged without changing the requirements for lessees of that program, as the native Hawaiian classification is both a state and a federal eligibility requirement. Because the United States reserved to itself the right to consent to any change in "the qualifications of lessees" under the program, and because Barrett had not named the United States as a defendant in his action, the Ninth Circuit concluded that Barrett could not seek relief regarding the Hawaiian Home Lands lease program. *Id.*

After concluding that Barrett lacked standing to pursue his claims, the Ninth Circuit examined John Carroll's standing to pursue his claims, concluding that he too lacked standing. *Id.* at 946. Carroll had asserted an injury-in-fact based on the mere existence of the alleged racial classifications of Hawaiians and native Hawaiians. *Id.* Carroll acknowledged that he "never identified any particular OHA program that he would like to participate

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[6] The district court had also determined that, in challenging the Hawaiian Home Lands lease program, Barrett had an injury-in-fact for standing purposes. The district court found this injury-in-fact even though Barrett had filed his Hawaiian Home Lands lease program application late, holding that Barrett's injury was his inability to compete on an equal footing with native Hawaiians. *See Carroll v. Nakatani,* 188 F.Supp.2d 1219, 1229 and 1230 n. 16 (D.Haw.2001).

in, and that he . . . never applied for any OHA program." *Id.* at 947. The Ninth Circuit concluded that Carroll's claims were of the kind that have been "rejected as an appropriate basis for standing." *Id.* Carroll's claims were merely improper generalized grievances that requested that Hawaii comply with the United States Constitution. *Id.; see also Hays,* 515 U.S. at 743, 115 S.Ct. 2431; *Allen,* 468 U.S. at 754, 104 S.Ct. 3315.

B. *Plaintiffs' Motion for Reconsideration of the Court's Earlier Limitation on Their Standing is Denied.*

1. *Plaintiffs Do Not Satisfy the Requirements to Obtain Reconsideration.*

Calling their motion a request that the court vacate restrictions on their standing, Plaintiffs ask this court to reconsider the earlier orders on standing. There are three grounds justifying reconsideration of an order: (i) an intervening change in controlling law, (ii) the availability of new evidence, and (iii) the need to correct clear error or prevent manifest injustice. *All Hawaii Tours v. Polynesian Cultural Ctr.,* 116 F.R.D. 645, 649 (D.Haw.1987), *rev'd in part on other grounds,* 855 F.2d 860, 1988 WL 86203 (9th Cir.1988); *see also* Local Rule 60.1 (allowing reconsideration based on: (a) the discovery of new material facts not previously available; (b) an intervening change in the law; or (c) a manifest error of law or fact). None of these grounds justifies reconsideration of this court's earlier standing orders.

Plaintiffs do not argue that new evidence has been discovered. To the extent Plaintiffs ask this court to reconsider its earlier orders as being based on manifest errors of law or fact, that request is untimely. Under Local

Rule 60.1, reconsideration motions based on claims of manifest errors of law or fact "must be filed not more than ten (10) business days after the court's written order is filed." Moreover, Plaintiffs have already filed an unsuccessful motion for reconsideration of the standing order. At best, Plaintiffs argue that there has been an intervening change in the law that expands Plaintiffs' state taxpayer standing. Plaintiffs' motion essentially presents argument about the proper scope of state taxpayer standing. This order supplements and clarifies the scope of state taxpayer standing as set forth in the court's previous orders. Plaintiffs' request for reconsideration of those orders based on intervening changes in the law is denied. No such intervening change has occurred.

In their Complaint, Plaintiffs allege that state taxes are being appropriated for DHHL/HHC, and that tax revenue is being spent by DHHL/HHC on the Hawaiian Home Lands lease program. Plaintiffs allege that the "HHCA laws require [DHHL/HHC] to work solely for the benefit of the racial class of native Hawaiians and to promote the interests of people in that class." Complaint (March 4, 2002), ¶ 58(d) at 25.

This court has ruled that Plaintiffs have state taxpayer standing to assert their claims under the Equal Protection Clause. *See* Order Granting in Part and Denying in Part Motions to Dismiss on Standing Grounds (May 8, 2002) at 1098-99, 2002 WL 32346742 at *4 ("Plaintiffs have standing to seek to restrain the State's expenditures of tax revenues on HHC, DHHL, and/or OHA."). The court further held that "Plaintiffs only have taxpayer standing to challenge direct expenditures of tax money by the legislature." *Id.* at 1100, 2002 WL 32346742, at *6. This court did not find that Plaintiffs may seek invalidation of

DHHL/HHC and OHA *in toto,* as it appears that both DHHL/HHC and OHA receive money from sources other than state taxes. Instead, the court ruled that Plaintiffs have standing to challenge only the expenditure of state tax money. The scope of Plaintiffs' state taxpayer standing has not been changed by *Carroll* or any other intervening decision on state taxpayer standing. However, as discussed later in this order, in light of *Carroll,* Plaintiffs' challenge to the Hawaiian Home Lands lease program must be dismissed.

This court has recognized that, in the Ninth Circuit, "a state taxpayer has standing to challenge a state statute" when that taxpayer is able to show that he or she "'has sustained or is immediately in danger of sustaining some *direct injury* as the result of [the challenged statute's] enforcement.'" *Cammack v. Waihee,* 932 F.2d 765, 769 (9th Cir.1991) (emphasis added) (quoting *Doremus v. Board of Educ.,* 342 U.S. 429, 434, 72 S.Ct. 394, 96 L.Ed. 475 (1952)). A taxpayer who brings a "good-faith pocket book action" and demonstrates that the challenged statute involves the expenditure of state tax revenues has such a "direct injury." *See Cammack,* 932 F.2d at 769. To have state taxpayer standing, the state taxpayer must allege that the "direct injury" is caused by the expenditure of state tax dollars "and there must be a substantial likelihood that the relief requested will redress the injury." *Bell v. City of Kellogg,* 922 F.2d 1418, 1423 (9th Cir.1991) (stating that the causation and redressability prongs of the standing analysis apply to state taxpayer standing cases); *accord Van Dyke v. Regents of Univ. of Cal.,* 815 F.Supp. 1341, 1343 (C.D.Cal.1993) ("Taxpayers have frequently been held to possess standing to challenge state expenditures that purportedly violate the Establishment

Clause. . . . Nevertheless, such plaintiffs must, like all others, demonstrate that they fulfill each of the constitutional and prudential requirements of the standing doctrine.").

The Ninth Circuit has examined the scope of state taxpayer standing in several cases. It allowed a challenge to Hawaii's Good Friday holiday for state government employees, finding a direct injury because the statute granting the Good Friday holiday was entirely intertwined with the expenditure of taxes, which paid state government employees' salaries during the holiday. *Cammack,* 932 F.2d at 771-72. The plaintiffs had state taxpayer standing "to challenge the expenditure of tax revenues on paid leave days for the Good Friday holiday." *Id.* at 772.

In *PLANS, Inc. v. Sacramento City Unified Sch. Dist.,* 319 F.3d 504 (9th Cir.2003), a very recent decision, the Ninth Circuit held that the plaintiff had state taxpayer standing. In *PLANS,* the plaintiff objected to the funding of a Waldorf school with state taxes. The Ninth Circuit focused on the inherently religious nature of the schools's entire curriculum, which was supported by state taxes. *Id.* at 507-08. The Ninth Circuit did not discuss the remedies available to the plaintiff if it succeeded in its suit.

Notwithstanding Plaintiffs' argument to the contrary, *PLANS* did not hold that the plaintiff in that case could have the Waldorf school itself declared unconstitutional. Nothing in *PLANS* indicates that, if successful, the plaintiff in that case would have been entitled to anything more than an order enjoining the expenditure of state taxes on the Waldorf school. Such a limitation would be consistent with the requirement articulated by the Ninth Circuit in *Bell v. City of Kellogg* that the injury – the expenditure of

state taxes – be redressable by the relief requested. *See Bell,* 922 F.2d at 1423. Although declaring the Waldorf school itself unconstitutional could redress the plaintiff's injury by preventing further state taxes from being spent on the school, that relief would go far beyond redressing the plaintiff's alleged injury. Under *Cammack,* the plaintiff in *PLANS* had standing to challenge the statute appropriating the state tax revenue to the Waldorf School, but not the existence of the school itself, as the plaintiff's alleged injury was the expenditure of the tax revenue, not the existence of the school. *See Cammack,* 932 F.2d at 769.

In a case with facts closer to the present case, the Ninth Circuit found that plaintiffs who challenge the appropriation, transfer, and spending of tax revenue from the General Fund of Hawaii's treasury for the benefit of "Hawaiians" under programs run by OHA had state taxpayer standing. *See Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1180-81 (9th Cir.1984). On remand in *Hoohuli,* the district court noted that it was not being asked to pass on the constitutionality of the OHA programs. *Hoohuli v. Ariyoshi,* 631 F.Supp. 1153, 1159 (D.Haw.1986). The court was only asked to determine whether the Hawaii legislature was allowed to extend benefits to both Hawaiians and native Hawaiians. *Id.* The plaintiffs' challenge in *Hoohuli* was therefore limited to the statute that caused the tax expenditure giving rise to the plaintiffs' taxpayer standing.

By contrast, in *Doe v. Madison School District No. 321,* 177 F.3d 789, 794 (9th Cir.1999), the Ninth Circuit found no state taxpayer standing for a challenge to expenditures of state tax revenue on a graduation prayer, as the plaintiff was unable to demonstrate that the prayer actually required state tax dollars to be spent. Instead, there was no direct injury that would be redressed if the

expenditure of state tax revenue were enjoined; the plaintiff acknowledged that graduation expenses would be incurred regardless of whether there was or was not a graduation prayer. *See id.*

Bell, Cammack, PLANS, Hoohuli, and *Madison* teach that, with state taxpayer standing, Plaintiffs may challenge programs run by DHHL/HHC and/or OHA, but only to the extent Plaintiffs can establish a "direct injury" caused by the expenditure of state tax revenue as a result of a state law. In addition, those cases instruct that Plaintiffs' claims must be redressable by an injunction prohibiting the expenditure of state tax revenue.

Accordingly, as the court ruled earlier, to the extent DHHL/HHC and OHA programs rely on funds other than tax money, Plaintiffs do not have state taxpayer standing to challenge those programs. For example, to the extent OHA receives rents from ceded lands and uses that money to fund programs for the benefit of Hawaiians and native Hawaiians, Plaintiffs do not have state taxpayer standing to challenge those programs. When rental income pays for a program, Plaintiffs cannot assert the requisite threatened or sustained direct pocketbook injury based on the expenditure of state tax money. *See Cammack,* 932 F.2d at 769-70. Moreover, with respect to rents, an injunction against the expenditure of state taxes would not redress Plaintiffs' claims.[7] However, to the extent the State of

[7] For example, if the State of Hawaii imposed a property tax to create a disaster relief fund, a citizen who paid income tax, but who did not own property and did not pay the property tax, would have no injury as a result of the property tax. In other words, that citizen would not be able to establish a causal link between the tax paid and the alleged harm suffered. In the present case, such a link would be

(Continued on following page)

Hawaii appropriates state tax revenue for programs, including, if applicable, the ceded land program administered by OHA, Plaintiffs do have state taxpayer standing to challenge those expenditures of state tax revenue, provided Plaintiffs also satisfy the causation, redressability, and prudential requirements for such standing.

Plaintiffs cite no persuasive authority indicating that state taxpayer standing may be extended to allow challenges to expenditures of any and all "public funds," including challenges to state money derived from sources other than state taxes. Plaintiffs also cite no authority indicating that, merely because a state legislature appropriates some measurable amount of tax revenue to a program, a state taxpayer can challenge the very existence of that program when the program can exist without the state's appropriation of tax revenue to it. Such a challenge would certainly present an impermissible generalized grievance.

In the present case, Plaintiffs allege that the state appropriates state tax revenue for the Hawaiian Home Lands lease program run by DHHL/HHC. Plaintiffs further allege that the state appropriates state tax revenue for various programs run by OHA. Accordingly, Plaintiffs allege "direct injuries" based on the state's expenditure of their state tax money, and the court must examine whether those injuries were caused by a state law and whether they can be redressed by an injunction prohibiting the expenditure of state tax revenue.

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missing to the extent DHHL/HHC and OHA administer programs using their own funds.

2. *Plaintiffs' Rule 54(b) Request is Denied.*

Under certain circumstances, a court may enter final judgment on a claim before final judgment is entered on all claims. Rule 54(b) of the Federal Rules of Civil Procedure states:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Accordingly, for Rule 54(b) to apply, there must be more than one claim and at least one claim must be fully resolved. *See Ariz. State Carpenters Pension Trust Fund v. Miller,* 938 F.2d 1038, 1039 (9th Cir.1991); *see also Curtiss-Wright Corp. v. Gen. Elec. Co.,* 446 U.S. 1, 7, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980). The court's previous orders limited Plaintiffs' claims to challenges to programs run by DHHL/HHC and OHA based on state taxpayer standing. The court ruled that Plaintiffs did not have standing to challenge those programs more broadly.

Even assuming that the court's earlier rulings could be said to be final resolutions because they ended the litigation of certain claims and left nothing for the court to do but execute judgment on those terminated claims, *see Miller,* 938 F.2d at 1039, the court must, in considering Rule 54(b) certification, examine whether "there is no just reason to delay the appeal." *See Curtiss-Wright,* 446 U.S. at 8, 100 S.Ct. 1460. "Not all final judgments on individual claims should be immediately appealable, even if they are

in some sense separable from the remaining unresolved claims." *Id.*

In deciding whether there is no just reason to delay an appeal, the court examines whether the claims are separable from the others remaining and whether the nature of the claims already determined is such that appellate courts would not have to decide the same issues more than once. *Id.* The court determines that the claims dismissed when the court limited Plaintiffs' claims to those based on state taxpayer standing are related to Plaintiffs' remaining claims. All of Plaintiffs' claims challenge programs on the same basis. Moreover, at the time of the earlier orders, this court had not yet ruled on all of the potential jurisdictional bars to Plaintiffs' claims, which could be raised even after the present order. In light of the present order dismissing the Hawaiian Home Lands lease program claim, certification of the previous standing orders appears particularly inappropriate. A complete record (especially on jurisdictional issues) before any appeal is taken would reduce the likelihood of piecemeal litigation and multiple appeals.

Nor do equitable concerns justify Rule 54(b) certification of the court's previous standing orders. Plaintiffs merely argue that they are getting older and that they have limited financial resources. These arguments, by themselves, do not support Rule 54(b) certification, as the arguments are shared by nearly every litigant in every case. Nor does Plaintiffs' claim of delay support such certification. Contrary to Plaintiffs' assertion that this court has placed this case "on the back burner," *see* Plaintiffs' Motion at 25, this court has attempted to set forth an orderly schedule for deciding the very important and complicated issues raised by Plaintiffs. The delays in this

case over the last few months have resulted from the death of one of Plaintiffs' lead attorneys and an intervening Ninth Circuit decision. These were extraordinary events that this court could not control and that are unlikely to be repeated before this case is completed in this court. Accordingly, the court finds that Plaintiffs' appeal to the equities does not overcome the policy against piecemeal appeals. *See Texaco, Inc. v. Ponsoldt,* 939 F.2d 794, 797-98 (9th Cir.1991) ("Rule 54(b) certification is scrutinized to 'prevent piecemeal appeals in cases which should be reviewed only as single units.'") (quoting *Curtiss-Wright,* 446 U.S. at 10, 100 S.Ct. 1460).

C. *Defendants' Motions to Dismiss The Claim Challenging the Hawaiian Home Lands Lease Program Are Granted.*

1. *Any Challenge to the Hawaiian Home Lands Lease Program Necessarily Includes a Challenge to the Admission Act, Which Plaintiffs Lack Standing to Attack.*

Defendants argue that Plaintiffs' state taxpayer standing is too limited to permit Plaintiffs' challenge to the Hawaiian Home Lands lease program. The court agrees and grants the motions to dismiss that challenge.

Any challenge to the use of state taxes for programs that allegedly violate the Equal Protection Clause requires this court to examine the laws underlying the expenditure of those taxes. Plaintiffs allege in their Complaint that their taxes are being appropriated for DHHL/HHC. They then allege that, because DHHL/HHC is required by "HHCA laws" to run the Hawaiian Home Lands lease program for the benefit of native Hawaiians, their taxes

are being unconstitutionally spent for the benefit of a racial class. *See* Complaint ¶ 58(d).

Under *Carroll,* any challenge to the lessee requirements of the Hawaiian Home Lands lease program set up by the HHCA, a state law, necessarily involves a challenge to the Admission Act, a federal law, as "[t]he native Hawaiian [lessee] classification is both a state and a federal requirement." *Carroll,* 342 F.3d at 944. Although Plaintiffs' state taxpayer standing allows them to challenge the expenditure of state taxes under state law, state taxpayer standing does not, by itself, permit a challenge to a federal law. *See W. Mining Council v. Watt,* 643 F.2d 618, 631-32 (9th Cir.1981). The federal law in issue here, the Admission Act, does not itself appropriate or disburse any money, much less any state tax revenue. The most Plaintiffs can argue is that the Admission Act required Hawaii to adopt the HHCA, which, in turn, resulted in state tax expenditures for the Hawaiian Home Lands lease program.

In *Western Mining Council,* the Ninth Circuit was faced with a state taxpayer's challenge to a federal law. The plaintiffs, claiming federal and state taxpayer standing, sought to "enjoin the Secretary of the Interior from expending certain funds appropriated" pursuant to the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782. *Id.* at 622. As the plaintiffs did not establish the required nexus between the claim asserted and their status as federal taxpayers, the Ninth Circuit held that they did not have federal taxpayer standing. *Id.* at 631. The Ninth Circuit then went on to say that the plaintiffs' status as state taxpayers was insufficient to support a challenge to federal law that did not itself appropriate or disburse any money. *Id.* The Ninth Circuit explained that, "[i]n . . . a state taxpayer challenge to federal statutes, the

policies of the standing doctrine demand that plaintiffs allege some injury which is more definite and individual than the higher state taxes allegedly suffered here."[8] *Id.* at 632. The Ninth Circuit concluded that the plaintiffs' challenge to the federal law presented "at best a highly generalized injury." *Id.*

The federal law at issue in *Western Mining Council* was admittedly a policy statement. However, there is no authority indicating that, for standing purposes, a court should examine a plaintiff's standing differently depending on whether the plaintiff is challenging a substantive federal law or a federal statute articulating federal policy. At the hearing on these motions, this court repeatedly asked whether any authority held that the answer to the question "Does state taxpayer standing permit a challenge to federal law that does not itself impose or spend state tax dollars?" turned on the nature of the federal law. No party identified any such authority.

Relying on *Western Mining Council,* this court holds that a challenge to the Admission Act requires standing that Plaintiffs lack. Plaintiffs' injury is only the expenditure of state taxes on the Hawaiian Home Lands lease

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[8] Ninth Circuit precedent is clear on this point. Other circuits examining the analogous issue of whether municipal taxpayer standing allows a challenge to state law are split. In *Board of Education of the Mount Sinai Union Free School District v. New York State Teachers Retirement System,* 60 F.3d 106, 111 (2d Cir.1995), the Second Circuit analogously ruled that municipal taxpayer standing is insufficient to allow a plaintiff to challenge state mandated laws. However, the Sixth Circuit, in *Gwinn Area Community Schools v. Michigan,* 741 F.2d 840, 844 (6th Cir.1984), *abrogated on other grounds, Lapides v. Bd. of Regents of Univ. Sys. of Georgia,* 535 U.S. 613, 619, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002), allowed municipal taxpayers to challenge a state law.

program. Nothing in the record indicates that the Admission Act itself requires any expenditure of state taxes.[9] A challenge to the lessee requirements under the Hawaiian Home Lands lease program is a challenge to both the HHCA, a state constitutional provision, and the Admissions Act, a federal law that mandates the lessee requirements. State taxpayer standing is insufficient to sustain such a challenge. *See W. Mining Council,* 643 F.2d at 631-32. Plaintiffs' challenge to the federal law underlying the Hawaiian Home Lands lease program presents the court with only a generalized grievance that Plaintiffs lack standing to bring. *Hays,* 515 U.S. at 743, 115 S.Ct. 2431; *Allen,* 468 U.S. at 754, 104 S.Ct. 3315.

Because Plaintiffs' Hawaiian Home Lands lease program claim necessarily involves a challenge to the Admission Act, a challenge that cannot be brought by a party with only state taxpayer standing, the court dismisses the claim. The court cannot enjoin the expenditure of state taxes on the Hawaiian Home Lands lease program without examining the constitutionality of the Admissions Act; no remedy can issue to Plaintiffs given their limited standing. Accordingly, the court dismisses all challenges to the Hawaiian Home Lands lease program. This means that DHHL/HHC, the United States, SCHHA, and the Hui Defendants are dismissed from this case, as those Defendants are only

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[9] This case therefore differs from *Carroll* in that Barrett, one of the plaintiffs in *Carroll,* had claimed an actual injury for standing purposes in the form of an inability to compete for Hawaiian Home Lands leases on an equal footing with native Hawaiians. Barrett's injury arose because the United States, in the Admission Act, required Hawaii to adopt the HHCA and run the Hawaiian Home Lands lease program. Unlike Barrett, Plaintiffs did not apply for a Hawaiian Home Lands lease under the HHCA.

involved in Plaintiffs' challenge to the Hawaiian Home Lands lease program.

2. *The Remaining Portions of Motions 2 Through 6 Are Denied.*

Given the dismissal of Plaintiffs' challenge to the Hawaiian Home Lands lease program, most of the remainder of Motions 2 through 6 is moot. For example, the court need not address OHA's claim that the United States is a necessary party to any challenge to ceded land revenue, as Plaintiffs' claims are limited to challenging the expenditure of state taxes. Similarly, the court need not address OHA's argument concerning the public land trust, as the court has already ruled that Plaintiffs may not proceed as purported beneficiaries of that trust.

Nor is the court persuaded at this time by OHA's argument that the claim against OHA should be dismissed if the United States is dismissed. OHA argues that any challenge to OHA necessarily includes a challenge to the Admission Act in which the United States must participate. Nothing in the Admission Act requires the creation of OHA or governs OHA's actions. Indeed, OHA was not created until many years after Hawaii became a state, and even then it took a state constitutional amendment to create OHA.

The court need not rule on the merits of the United States' motion to strike; the dismissal of the claims against the United States makes the motion to strike moot.

The remaining portions of Motions 2 through 5 present arguments properly brought in a round of summary

judgment motions not limited to the effect of *Carroll* on this action.

V. *CONCLUSION.*

Plaintiffs' motion to vacate restrictions on their standing, which the court views as a motion for reconsideration, is denied. Plaintiffs' request for Rule 54(b) certification of this court's earlier standing orders is also denied.

Because Plaintiffs' state taxpayer standing does not allow them to challenge the federal lessee requirements for the Hawaiian Home Lands lease program, and because, under *Carroll,* challenging federal law is a necessary element of challenging the corresponding state law, Plaintiffs lack standing to challenge that program. Accordingly, to the extent various Defendants seek dismissal of Plaintiffs' claim regarding the Hawaiian Home Lands lease program, those motions are granted. The United States, DHHL/HHC, SCHHA, and the Hui Defendants are dismissed from this case. The court denies other portions of Defendants' motions.

The United States' motion to strike is denied as moot.

This order leaves for further adjudication the Plaintiffs' challenge as state taxpayers to the expenditure of state tax revenue on various programs administered by OHA. That challenge, however, should possibly be limited to certain Plaintiffs. At the hearing, counsel for Plaintiffs admitted that, because of their Hawaiian ancestry, Plaintiffs Sandra Puanani Burgess, Donna Malia Scaff, and Evelyn C. Arakaki, who are Hawaiian and therefore eligible to participate in OHA programs, lacked standing to pursue claims against OHA. In a subsequent letter to

this court dated November 19, 2003, Plaintiffs imply that OHA runs programs for which Burgess, Scaff, and Arakaki are not eligible because those programs are available only to native Hawaiians.[10] Plaintiffs are ordered to show cause why Sandra Puanani Burgess, Donna Malia Scaff, and Evelyn C. Arakaki should not be dismissed for lack of standing because of their eligibility for OHA programs. No later than December 3, 2003, Sandra Puanani Burgess, Donna Malia Scaff, and Evelyn C. Arakaki must identify the OHA programs for which they are not eligible. A hearing on this order to show cause will be held on January 12, 2004, at 9:00 am.

The court has scheduled the first round of summary judgment motions on this remaining claim for January 12, 2004, at 9:00 am. Those motions shall be filed and served no later than December 3, 2003. A party may, but need not, opt to file just an amended hearing notice that states that it incorporates a previously withdrawn motion, without the need to attach or refile that previously withdrawn motion. In the alternative, a party may file new papers. Parties may not simultaneously file new papers and file separate documents incorporating previously withdrawn papers, and may not, if any new papers are filed, state that the new papers incorporate previous filings. Any opposition shall be filed and served no later than December 15, 2003. Any reply shall be filed and served no later than December 22, 2003. The parties shall follow all other

[10] The court agrees with Plaintiffs that, contrary to a report by the media, Plaintiffs did not agree to dismissal of Burgess, Scaff, and Arakaki at the hearing on these motions. The court understood Plaintiffs to be saying at the hearing only that such dismissal would be warranted if the court dismissed the claim concerning the Hawaiian Home Lands lease program.

local rules for this first round of summary judgment motions, which is limited to motions that do not turn on or relate to the level of scrutiny that applies to Plaintiffs' claim.

IT IS SO ORDERED.

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299 F.Supp.2d 1107

United States District Court, D. Hawai'i.

Earl F. ARAKAKI, et al., Plaintiffs,

v.

Benjamin J. CAYETANO in his official capacity as Governor of the State of Hawaii, et al., Defendants.

Civil No. 02-00139 SOM/KSC.

June 18, 2002.

H. William Burgess, Patrick W. Hanifin, Im Hanifin Parsons, LLLC, Honolulu, HI, for Plaintiffs.

Charlene M. Aina, Gerard D. Lau, State of Hawaii, Attorney General, Honolulu, HI, for Benjamin J. Cayetano, State Officials, Hawaiian Homes Commissioners.

Thomas A. Helper, U.S. Attorney's Office, Honolulu, HI, for United States of America.

Sherry P. Broder, Davies Pacific Center, Honolulu, HI, for Trustees of the Office of Hawaiian Affairs.

Robert G. Klein, McCorriston MillerMukai MacKinnon, Honolulu, HI, for Defendant-Intervenor SCHHA.

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE ORDER DISMISSING THEIR PUBLIC LAND TRUST CLAIMS

MOLLWAY, District Judge.

I. *INTRODUCTION.*

On May 8, 2002, this court granted in part and denied in part a motion to dismiss ("Order"), 299 F.Supp.2d 1090, 2002 WL 32346742. The court found that Plaintiffs had taxpayer standing to assert equal protection challenges to

the provision of benefits ("Benefits") by the Office of Hawaiian Affairs ("OHA"), the Department of Hawaiian Home Lands ("DHHL"), and the Hawaiian Homes Commission ("HHC") to Hawaiians and to native Hawaiians. However, the court found that Plaintiffs lacked standing to assert claims for breach of the public land trust created by section 5(f) of the Admissions Act.

To the extent the court dismissed their public land trust claims for lack of standing, Plaintiffs now move for reconsideration of the order. Plaintiffs fail to justify reconsideration of the order dismissing their public land trust claims. Their motion for reconsideration is denied.

II. *RECONSIDERATION STANDARD.*

Courts have established three grounds justifying reconsideration of an order: (i) an intervening change in controlling law, (ii) the availability of new evidence, and (iii) the need to correct clear error or prevent manifest injustice. *Decker Coal Co. v. Hartman*, 706 F.Supp. 745, 750 (D.Mont.1988); *All Hawaii Tours v. Polynesian Cultural Ctr.*, 116 F.R.D. 645, 649 (D.Haw.1987), *rev'd in part on other grounds,* 855 F.2d 860, 1988 WL 86203 (9th Cir.1988). These grounds are set forth in Local Rule 60.1, which allows reconsideration of interlocutory orders upon the following grounds: (a) discovery of new material facts not previously available; (b) intervening change in the law; or (c) manifest error of law or fact.

III. *ANALYSIS.*

Plaintiffs argue that this court erred in finding that they lack standing to assert claims as beneficiaries of the

public land trust created by section 5(f) of the Admissions Act.[1] Plaintiffs' arguments are unpersuasive.

A. *Plaintiffs Did Not Timely Argue that They Are Proceeding on a Theory of Direct Injury. Even if Their Arguments Were Timely, They Are Insufficient For Standing Purposes.*

Until recently, Plaintiffs had not asserted that they were victims of actual discrimination. *See* Order at 1095 n. 4, 1104-05. They did not, for example, assert that they had applied for Benefits and were turned down solely because of their race. Instead, Plaintiffs previously argued that injuries were based solely on the expenditure of their state taxes on allegedly racially discriminatory programs and the state's alleged breaches of a public land trust created to benefit them as well as others. On this motion for reconsideration, however, Plaintiffs assert what they say are "direct injuries" for purposes of the standing analysis.

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[1] Plaintiffs say that there is and has been only one true public land trust-the one created in 1898. *See* Motion for Reconsideration (May 22, 2002) at 13-14. However, Plaintiffs are only challenging the trust as it exists through its present trust instrument, section 5(f) of the Admissions Act. *See* Transcript of Proceedings on Motion to Dismiss (filed May 10, 2002) at 38-40. Plaintiffs are not asserting claims that prior versions of the public land trust were breached, as those prior versions of the public land trust were either modified and/or amended by the Hawaiian Homes Commission Act and/or Admissions Act. Moreover, it is possible that Plaintiffs are not beneficiaries under those prior versions. Accordingly, even though Plaintiffs argued at the hearing on their Motion for Temporary Restraining Order that the 1898 public land trust was breached when the Hawaiian Homes Commission Act and the Admissions Act were enacted, see Transcript of Proceedings on Motion for Temporary Restraining Order (filed March 13, 2002) at 19-20, Plaintiffs have abandoned that argument and are clearly proceeding only on the argument that section 5(f) of the Admissions Act is being breached.

See Motion at 5. This argument is untimely and unpersuasive.

Plaintiffs raised the issue of direct injury through several supplemental declarations filed after the briefing period for the motion to dismiss closed. Plaintiffs claim that Rule 6 of the Federal Rules of Civil Procedure allows them to file such declarations. Even assuming that Rule 6 allows the filing of supplemental declarations after the briefing period has closed but before the hearing on a motion, those declarations clearly violated Local Rule 7.6. Local Rule 7.6 requires declarations and affidavits to contain only facts, not conclusions and argument. This court may disregard any declaration or affidavit not in compliance with Local Rule 7.6. The supplemental declarations of Patricia Carroll and Roger Grantham did not contain only facts, but instead were filled with speculative conclusory statements and argument.

For example, Carroll and Grantham postulated that, if the State did not fund the Benefits, Carroll could have a better graduate education and Grantham's daughter could have air conditioning in her classroom. But Carroll and Grantham never established that, but for the funding of the Benefits, money would actually be spent on the programs they identified. Even assuming that the money spent on the Benefits would be used for public education if it were not spent on the Benefits, there is no way of determining how that money would be used to further public education. That money might, for example, be used to enhance the state's special education or extracurricular programs. It is pure speculation and argument for Carroll and Grantham to conclude that they have suffered an injury because money now spent on the Benefits might be allocated in a manner that enhances Carroll's graduate

education and adds air conditioning to Grantham's daughter's classroom. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (to have standing to maintain a claim, a plaintiff must demonstrate: 1) an injury in fact-an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical; 2) a causal relationship between the injury and the challenged conduct-an injury that is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and 3) a likelihood, not mere speculation, that the injury will be redressed by a favorable decision); *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir.1996). Accordingly, even though Plaintiffs say that they have suffered "direct injuries," those injuries are clearly insufficient to meet the requirements for standing.[2]

[2] Plaintiffs' citation to *Price v. Akaka*, 928 F.2d 824 (9th Cir.1990) (*"Price III"*), *cert. denied*, 502 U.S. 967, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991), is unpersuasive. In the context of a claim challenging the public land trust trustees' failure to spend any money for the betterment of the conditions of native Hawaiians, *Price III* stated that the native Hawaiian plaintiffs had standing to assert that the trustees should be spending some money to benefit native Hawaiians, even though the trust instrument allowed the trustees to spend the trust assets on other things. *See id.* at 826. In the present case, however, Plaintiffs' alleged "direct injuries" are not based on the trustees' expenditure of funds, but instead on the state legislature's expenditure of funds.

B. *Plaintiffs Do Not Establish Their Entitlement to Proceed Based on Trust Beneficiary Standing.*

Citing *Com. of Pennsylvania v. Board of Dirs. of City Trusts of Philadelphia*, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957), Plaintiffs contend that they have trust beneficiary standing to assert a claim challenging the restriction of Benefits to Hawaiians and native Hawaiians as being racially discriminatory and therefore illegal. *Pennsylvania* held that the government, while acting as trustee of a public land trust, cannot enforce privately created racial classifications. *Id.* at 231, 77 S.Ct. 806. *Pennsylvania,* however, does not establish that Plaintiffs are entitled to trust beneficiary standing, as *Pennsylvania* involved a challenge by persons who claimed to have been victims of actual discrimination, not trust beneficiaries claiming that a trust term was illegal. *Id.* In *Pennsylvania,* the plaintiffs had actually applied for admission to the school that received the trust's funds for the benefit of "poor white male orphans." *Id.* The two plaintiffs were not admitted to the school based on their race, as they were not "white." They were victims of actual discrimination for standing purposes. *Id.* As there is no question that Plaintiffs here have not suffered any actual discrimination, *Pennsylvania* is inapplicable and Plaintiffs' citation to *Pennsylvania* does not establish a manifest error of law or fact by this court.[3]

[3] For the first time in their reply in support of their motion for reconsideration, Plaintiffs assert that, as beneficiaries of the public land trust, "they did 'apply' to the trustee, the State, for their equal share of the benefits." Thus, Plaintiffs argue, *Pennsylvania* is applicable to the present case. Reply at 9. Not only is this new argument untimely, as it is raised for the first time in their reply and could have easily been

(Continued on following page)

Plaintiffs cite sections 166 and 214 of the Restatement of Trusts 2d for the propositions that a trustee has a duty not to comply with an illegal trust term, and that a trust beneficiary may sue to enforce the duties of the trustee "to him." These provisions do not purport to speak to the issue of federal court standing. Indeed, by referring to a trustee's breach of a duty "to him," the provisions appear to be referring more to direct injuries than to general challenges as to legality brought by members of the public. *See* Restatement (Second) of Trusts § 214, cmt. b (1959) ("A particular beneficiary cannot maintain a suit for a breach of trust which does not involve any violation of duty to him").

The Ninth Circuit has not broadly approved of trust beneficiary standing for members of the public to assert claims that the section 5(f) trust is being breached. At most, the Ninth Circuit has permitted native Hawaiians to attempt to compel Hawaii to abide by the terms of the section 5(f) trust. *See Price III*, 928 F.2d 824. In allowing native Hawaiians to assert claims that Hawaii was breaching the public land trust by comingling funds, expending none of those funds on native Hawaiians, and using the funds for purposes other than those listed in section 5(f), the Ninth Circuit cited section 391 of the

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asserted in the underlying motion itself, *see infra* at 1113, it also stretches the facts. The alleged "applications" are evidenced by letters from H. William Burgess. Although he is counsel of record for Plaintiffs, he appears to have written those letters on his own behalf, not on Plaintiffs' behalf. The letters make no mention of clients. *See* Exs. I to Q of Plaintiffs' Opposition to the Motion to Dismiss. Plaintiffs therefore cannot rely on these letters as their "applications" for Benefits. If Plaintiffs continue to rely on these letters, the letters may be the subject of discovery and may make Mr. Burgess a witness in this case.

Restatement of Trusts 2d. The Ninth Circuit was citing that provision for the proposition that the native Hawaiian claims were consistent with the common law of trusts that allows beneficiaries to assert breaches of trusts even though the trustee may, consistent with the trust instrument, use the trust solely to benefit others. *Id.* at 827. Section 391 states that, absent a "special interest" in the enforcement of a charitable trust, a member of the public may not maintain an action for the enforcement of that trust. Restatement (Second) of Trusts § 391 (1959).[4] Although *Price III* did not deem the section 5(f) trust to be a charitable trust for which section 391 is applicable, the Ninth Circuit's citation of section 391 implies that some type of "special interest" is needed for a member of the public to bring a suit for breach of the public land trust created by section 5(f) of the Admissions Act.

In *Price III,* the native Hawaiian plaintiffs had such a "special interest" in seeing that they received benefits from the public land trust that was set up, at least in part, for their express benefit. Although the section 5(f) trust arguably benefits every member of the public in Hawaii, it is this notion that something more than membership in the public is needed to maintain such a claim that lies at the heart of this court's determination that Plaintiffs lack standing to assert their public land trust claims. Because Plaintiffs assert standing based only on being part of the public generally, and because Plaintiffs have cited no authority indicating that they have federal court standing in that capacity to allege a breach of the public land trust,

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[4] Comment d of section 391 clarifies that the "mere fact that . . . members of the public . . . benefit from the enforcement of the trust is not a sufficient ground to entitle them to sue." *Id.*, cmt. d

Plaintiffs have not demonstrated that this court erred in dismissing their claims for breach of the public land trust based on a lack of standing.

C. *Plaintiffs Have Not Demonstrated That They Have Prudential Standing.*

Plaintiffs have not demonstrated any manifest error of law or fact because they have not shown prudential standing to assert their breach of the public land trust claims. *See* Order at 1104-05. In their Motion for Reconsideration, Plaintiffs cite *Napeahi v. Paty*, 921 F.2d 897 (1990), *cert. denied*, 502 U.S. 901, 112 S.Ct. 278, 116 L.Ed.2d 230 (1991), and *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (1990) ("*Ulaleo II*"), for the proposition that all members of the public of Hawaii have prudential standing to assert claims that the public land trust is being breached by provision of Benefits to only Hawaiians and native Hawaiians.[5] Neither case is persuasive. Like the various *Price* decisions discussed in the Order, *Napeahi* and *Ulaleo II* found standing for native Hawaiians and a native Hawaiian group to assert an actual breach of the public land trust. The cases did not hold that the public in general has standing to contest the terms of the trust. In all of the cases, native Hawaiians or native Hawaiian groups had standing to assert claims based on the beneficiary status granted to them by the trust's express purpose of being for the betterment of the conditions of native

[5] Borrowing a term from an earlier version of the public land trust, Plaintiffs argued in the underlying motion that all "inhabitants" of Hawaii have prudential standing. However, the current version of the section 5(f) public land trust does not refer to "inhabitants," but instead to the public.

Hawaiians. None of these cases involved the public of the State of Hawaii or the issue of whether the public has prudential standing to assert claims that the public land trust is being breached.

Napeahi certainly does not support Plaintiffs' claims that the prudential limitations on standing are satisfied in this case. In *Napeahi*, Napeahi claimed that Hawaii breached the public land trust when it allowed some alleged trust land to be abandoned to a private developer. *Id.* at 899. The Ninth Circuit determined that, as a native Hawaiian, Napeahi had trust beneficiary standing to assert a breach of the public land trust's provision that the land be used, at least in part, "for the betterment of the conditions of native Hawaiians." *Id.* at 901 n. 2. In noting that Napeahi had standing, the Ninth Circuit cited *Price v. Akaka*, 915 F.2d 469 (9th Cir.1990), which was amended and superseded by *Price III*, 928 F.2d 824. Like *Napeahi*, *Price III* involved native Hawaiian plaintiffs who had standing to assert claims that the public land trust was being breached. Neither *Napeahi* nor *Price III* examined prudential standing for the public of Hawaii to assert claims alleging a breach of the public land trust.

Ulaleo II is similarly distinguishable. In *Ulaleo II*, the Ninth Circuit, citing *Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir.1985) ("*Price I*"), *cert. denied*, 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986), found that an individual native Hawaiian plaintiff and the Pele Defense Fund ("PDF") had standing to assert breaches of the public land trust. *Ulaleo II*, 902 F.2d at 1397. Because the Ninth Circuit did not examine the "ancestry of the organization's members" in *Ulaleo II*, *see* Motion at 12, Plaintiffs argue that race is unimportant in determining whether parties have standing to assert breaches of a public land trust.

However, PDF's members must have included native Hawaiians, as PDF was asserting claims on behalf of native Hawaiians. *See Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir.2000) ("An organization has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit") (quotations omitted). In the District Court opinion in *Ulaleo*, Judge Alan C. Kay noted that the plaintiffs were alleging that the land exchange between Hawaii and Campbell Estate violated section 5(f) of the Admissions Act because Hawaii did not make a record of the impact that exchange would have on the rights of native Hawaiians. *See Ulaleo v. Paty*, Civil No. 88-320 ACK, slip op. at 3-4 (D.Haw. July 26, 1989) ("*Ulaleo I*").

PDF (in *Ulaleo I* and *Ulaleo II*) and the Hou Hawaiians (in *Price I*) were claiming that Hawaii was breaching its duty under the public land trust to better the conditions of native Hawaiians. The recognition of standing for PDF and the Hou Hawaiians does not require that Plaintiffs be found to have standing here. Plaintiffs claim standing only as members of the public of the state of Hawaii, a status that all but destroys any standing requirement.

Plaintiffs cite no authority indicating that the public in general has standing to assert claims for breaches of a public land trust. Authorities indicating that native Hawaiians and native Hawaiian groups may assert such claims do not go as far as Plaintiffs would have this court go. Plaintiffs demonstrate no manifest error of law or fact

that would justify reconsideration of this court's determination that Plaintiffs lack prudential standing to assert their breach of public land trust claims as members of the public of Hawaii.

In their reply, Plaintiffs argue that their claims are not precluded because the members of the public of Hawaii are indeed subject to limitation. As the public land trust was created "for the betterment of the conditions of native Hawaiians," *see* P.L. 86-3 (March 18, 1959), § 5(f), *reprinted in* 73 Stat. 4, 6, Plaintiffs argue that the term "public" excludes native Hawaiians, as they receive Benefits and cannot challenge that receipt. This court recognized this limitation in the Order, but noted that the public was still too broad to merit prudential standing. *See* Order at 1104 n. 17.

Plaintiffs also argue that an additional 240,000 people, the alleged number of Hawaiians eligible to receive Benefits from OHA, are excluded from the public with standing. Plaintiffs say that, "[a]ccording to the 2,000 Census, there are about 240,000 residents of Hawaii who consider themselves at least part Hawaiian." Reply in Support of Motion for Reconsideration at 3. As this argument was raised for the first time in their reply, this court disregards it pursuant to Local Rule 7.4 ("Any arguments raised for the fist [sic] time in the reply shall be disregarded")[6] Moreover, Plaintiffs' citation to the 2000 Census cannot be considered newly discovered evidence that could justify a motion for reconsideration. To support such a motion,

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[6] Even assuming that the number of Hawaiians in Hawaii was stated somewhere in the papers on the underlying motions, this court had no independent duty to search the voluminous record for such a number.

Plaintiffs would have to show not only that the evidence was newly discovered or unknown to them until after the hearing on the underlying motion, but also that they could not with reasonable diligence have discovered and produced such evidence at the hearing. *See Engelhard Indus., Inc. v. Research Instr. Corp.*, 324 F.2d 347, 352 (9th Cir.1963), *cert. denied*, 377 U.S. 923, 84 S.Ct. 1220, 12 L.Ed.2d 215 (1964). Plaintiffs have made no such showing.

In any event, even assuming that the members of the public of Hawaii do not include 240,000 people in Hawaii, the members of the public remain so numerous that Plaintiffs can fairly be said to be asserting a generalized grievance. They therefore fail to demonstrate that they have prudential standing.[7] *See United States v. Hays*, 515 U.S. 737, 743, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995).

Because Plaintiffs have failed to demonstrate that this court erred in determining that they lacked prudential standing, they have failed to demonstrate that the order

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[7] Although *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir.1984), allowed state taxpayers to assert claims, indicating that prudential standing limitations do not bar claims shared with members of the state taxpayer base, Plaintiffs cite no authority indicating that the number of people who pay taxes (a number that would exclude children, low income families, delinquent taxpayers, and retirees) to Hawaii is greater than the number of members of the public (even assuming that the "public" does not include the 240,000 Hawaiians). The term "public" is so broad that it could include hundreds of thousands of transient visitors every year or anyone else who uses public improvements or public lands. *See* Admission Act, ¶ 5(f). Given the broad and indefinite character of the "public," it is highly doubtful that Plaintiffs could have made such a showing even had they timely submitted statistical evidence. Accordingly, Plaintiffs have not shown that *Hoohuli* compels a finding of prudential standing for Plaintiffs.

dismissing their public land trust claims should be reconsidered.[8]

IV. *CONCLUSION.*

Because Plaintiffs have failed to demonstrate any reason justifying reconsideration of the Order, their motion for reconsideration is denied.

IT IS SO ORDERED.

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[8] As Plaintiffs lack prudential standing to assert claims for breach of the public land trust, Plaintiffs can show no manifest error of law or fact arising from their other arguments for public trust beneficiary standing. Accordingly, even assuming that Plaintiffs can properly allege that the state breached its duty to Plaintiffs to not enforce an illegal trust term, they lack standing to assert such a claim in this court based solely on the fact that they are beneficiaries of the trust as members of the public of Hawaii. Similarly, even assuming that beneficiaries of a city public trust may assert breaches of that trust under *Kapiolani Park Preservation Soc. v. City & County of Honolulu*, 69 Haw. 569, 572-73, 751 P.2d 1022, 1025 (1988), when the government refuses to seek instructions as to the lawfulness of an action relating to the trust, Plaintiffs still lack prudential standing under federal law to assert, as members of the public of Hawaii, that the public land trust created by section 5(f) is being breached.

299 F.Supp.2d 1090

United States District Court,D. Hawai'i.
Earl F. ARAKAKI, et al., Plaintiffs,
v.
Benjamin J. CAYETANO in his official capacity as Governor of the State of Hawaii, et al., Defendants.
Civil No. 02-00139 SOM/KSC.

May 8, 2002.

H. William Burgess, argued, Patrick W. Hanifin, argued, Im Hanifin Parsons, LLLC, Honolulu, HI, for Plaintiffs.

Gerard D. Lau, argued, State of Hawaii, Attorney General, Honolulu, HI, for Benjamin Cayetano, State Officials, Hawaiian Homes Commissioners.

Sherry P. Broder, argued, Honolulu, HI, for Trustees of the Office of Hawaiian Affairs.

Robert G. Klein, argued, McCorriston MillerMukai MacKinnon, Honolulu, HI, for Defendant-Intervenor SCHHA.

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS ON STANDING GROUNDS; ORDER DENYING MOTION TO DISMISS (OR RECONSIDER PRIOR ORDER FINDING TAXPAYER STANDING) ON POLITICAL QUESTION GROUNDS

MOLLWAY, District Judge.

I. *INTRODUCTION.*

Plaintiffs, some of whom are of Hawaiian ancestry, seek to stop Defendants' provision of benefits to only

persons of Hawaiian or native Hawaiian ancestry.[1] Plaintiffs identify themselves as individual taxpayers in Hawaii and beneficiaries of a public land trust.

Defendants have moved in three separate motions to dismiss this case. Defendants State of Hawaii ("State" or "Hawaii"), the Hawaiian Homes Commission ("HHC"), and the Department of Hawaiian Home Lands ("DHHL") have moved to dismiss based on an alleged lack of standing.[2] Defendant Office of Hawaiian Affairs ("OHA") has also moved to dismiss this action based on an alleged lack of standing. OHA additionally argues that this case should be dismissed (or alternatively that the court should reconsider its previous standing determination) because the case allegedly involves a nonjusticiable political question.

This court is bound by the Ninth Circuit's decision in *Hoohuli v. Ariyoshi,* 741 F.2d 1169 (9th Cir.1984). Applying *Hoohuli,* the court concludes that Plaintiffs have taxpayer standing to assert their Equal Protection claims. To the extent Plaintiffs assert claims that are not premised on actual expenditures of tax funds, however, those claims are dismissed.

Plaintiffs lack standing to assert claims as alleged beneficiaries of a public land trust created by the Admissions Act in 1959. Accordingly, the court dismisses Plaintiffs' breach of public land trust claims.

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[1] The court uses the terms "Hawaiian" and "native Hawaiian" as defined in Haw.Rev.Stat. § 10-2. *See Arakaki v. Cayetano,* 198 F.Supp.2d 1165, 1172 n. 6 (D.Haw.2002).

[2] As required by Hawaii law, Plaintiffs named as Defendants various state officials in their official capacities, rather than the agencies they head. The court treats those Defendants as being the State, DHHL, and OHA.

Because OHA has not here demonstrated that the claims against it should be dismissed as involving a nonjusticiable political question, the court denies OHA's motion to dismiss on that ground and declines to reconsider the court's previous denial of a request for a temporary restraining order.

II. *FACTUAL BACKGROUND.*

The factual background was set forth in this court's previous Order Denying Plaintiffs' Motion for Temporary Restraining Order. *Arakaki v. Cayetano,* 2002 WL 654084 (D.Haw., March 18, 2002).[3] That factual background is incorporated by reference.

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[3] In the course of these proceedings, OHA has complained about Plaintiffs' occasional reliance on district court opinions that, unlike this court's order denying a temporary restraining order, are unpublished. OHA misunderstands the status of federal district court opinions. Citing to Ninth Circuit and Hawaii state cases, OHA argues that unpublished opinions should not be considered. Both the Ninth Circuit and Hawaii state courts have specific prohibitions preventing the citation of unpublished decisions. *See* 9th Cir. R. 36-3 (stating that unpublished decisions of the Ninth Circuit generally may not be cited); *Chun v. Board of Trs. of Employees' Ret. Sys. of Haw.*, 92 Hawai'i 432, 446, 992 P.2d 127, 141 (2000) (holding that an unpublished decision of a state trial court may not be cited). However, unlike the Ninth Circuit and Hawaii state courts, this court has not adopted any rule that prohibits the citation of unpublished decisions of this court. Therefore, in this district, an unpublished federal district court decision has no more and no less force and effect than a published federal district court decision. No district court opinion, published or unpublished, constitutes precedent binding in any other case on any judge; that is, other district judges may freely differ with any district judge's opinion, published or unpublished. However, in the absence of any rule, practice, or order to the contrary, any district court opinion, published or unpublished, may be cited for persuasive purposes.

III. *STANDARD OF REVIEW.*

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may either attack the allegations of the complaint as insufficient to confer subject matter jurisdiction on the court, or attack the existence of subject matter jurisdiction in fact. *Thornhill Publ'g Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir.1979). When the motion to dismiss attacks the allegations of the complaint as insufficient to confer subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Federation of African Amer. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir.1996). When the motion to dismiss is a factual attack on subject matter jurisdiction, however, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact. *Thornhill*, 594 F.2d at 733. The present motions involve both facial and factual attacks.

Plaintiffs have the burden of proving that jurisdiction does in fact exist. *Thornhill*, 594 F.2d at 733. Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. *In re Syntex Corp. Securities Lit.*, 95 F.3d 922, 926 (9th Cir.1996).

IV. *ANALYSIS.*

A. *Plaintiffs Have Standing to Assert Some of Their Equal Protection Claims.*

As the court noted in denying Plaintiffs' earlier motion for a TRO, Plaintiffs are claiming that the provision of benefits exclusively to Hawaiians and/or native Hawaiians

by OHA, HHC, and DHHL violates the Equal Protection Clause of the Fourteenth Amendment. Defendants now move to dismiss these claims based on an alleged lack of standing.

1. *Plaintiffs Have State Taxpayer Standing.*

Article III, section 2, of the Constitution confines federal courts to deciding cases or controversies. A plaintiff in a federal case must show that an actual controversy exists at all stages of the case. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 63, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). No case or controversy exists if a plaintiff lacks standing to make the claims asserted. *See White v. Lee,* 227 F.3d 1214, 1242 (9th Cir.2000) (stating that standing pertains to a federal court's subject matter jurisdiction).

Plaintiffs must demonstrate: 1) an injury in fact-an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical; 2) a causal relationship between the injury and the challenged conduct-an injury that is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and 3) a likelihood, not mere speculation, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1126 (9th Cir.1996).

Plaintiffs argue that they have been injured as Hawaii taxpayers. They claim to have state taxpayer standing to bring Equal Protection claims.[4] Historically, taxpayers of a municipality were allowed to maintain an action against a city to enjoin the illegal use of the municipality's money. *See Frothingham v. Mellon,* 262 U.S. 447, 486, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). *Frothingham* noted that municipal taxpayers were allowed to maintain these suits because their interests in the expenditure of municipal funds was "direct and immediate." *Id.* The Court has treated federal taxpayers differently.

The interests of federal taxpayers in moneys of the United States treasury "is shared with millions of others" and "is comparatively minute and indeterminable." *Id.* at 487, 43 S.Ct. 597. As the expenditure of federal tax funds is more of a "public" than an "individual" concern, *Frothingham* concluded that, absent a "direct injury suffered or threatened," no case based on federal taxpayer standing

[4] Plaintiffs do not allege discrimination that has caused injuries personal to them. They do not, for example, claim to have applied for benefits and have been turned down solely because they were not Hawaiian or native Hawaiian. Nor do Plaintiffs argue that they have taxpayer standing based on their payment of municipal or federal taxes. Plaintiffs attempt to show a direct injury through submission of supplemental declarations by Plaintiffs Patricia Carroll and Roger Grantham. The court disregards these as not timely filed. Even if the court considered these declarations, the matters raised are too speculative to demonstrate a direct injury. The essence of those declarations is that, if the State did not give money to OHA and DHHL, Carroll could have a better graduate education and Grantham's daughter could have air conditioning in her classroom. Plaintiffs have not established that, but for the funding going to OHA and DHHL, money would actually be spent on programs they identify. That is, there is no evidence that the State legislature would instead appropriate money relating to Carroll's graduate studies or install air conditioning in Grantham's daughter's classroom.

may be maintained. *Id.* at 487-88, 43 S.Ct. 597. It is not enough that a federal taxpayer "suffers in some indefinite way in common with people generally." *Id.* at 488, 43 S.Ct. 597.

In *Flast v. Cohen,* 392 U.S. 83, 92, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), the court noted that *Frothingham* had been "the source of some confusion." *Flast* attempted to end that confusion. Under *Flast,* whether an individual has federal taxpayer standing to maintain an action turns on whether the plaintiff "can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." *Id. Flast* stated:

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper

> and appropriate party to invoke a federal court's jurisdiction.

Flast, 392 U.S. at 102-03, 88 S.Ct. 1942.

Flast stated that the Establishment Clause of the First Amendment specifically limits the taxing and spending power of Congress.[5] *Id.* at 105, 88 S.Ct. 1942. Accordingly, taxpayers asserting violations of the Establishment Clause satisfy the second prong of *Flast's* test.

The Court subsequently recognized that *Flast* created a "narrow exception" to the general rule against taxpayer standing established in *Frothingham*. *See Bowen v. Kendrick*, 487 U.S. 589, 618, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). Some courts have gone further, interpreting *Flast* as applying "only to cases in which a federal taxpayer challenges a congressional appropriation . . . that allegedly violates the Establishment Clause." *See, e.g., Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1399 (10th Cir.1992), *cert. denied*, 507 U.S. 949, 113 S.Ct. 1360, 122 L.Ed.2d 739 (1993).

This case is not premised on either municipal taxpayer or federal taxpayer standing. Instead, it is based on state taxpayer standing, which the Ninth Circuit treats more like municipal taxpayer standing than federal taxpayer standing. In the Ninth Circuit, a state taxpayer has standing to challenge a state statute when that taxpayer is able to show that he or she "'has sustained or is immediately in danger of sustaining some direct injury

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[5] The Court noted, however, that, whether "the Constitution contains other specific limitations[,] can be determined only in the context of future cases." *Id.* at 105, 88 S.Ct. 1942.

as the result of [the challenged statute's] enforcement.'" *Cammack v. Waihee,* 932 F.2d 765, 769 (9th Cir.1991) (quoting *Doremus v. Board of Educ.,* 342 U.S. 429, 434, 72 S.Ct. 394, 96 L.Ed. 475 (1952)), *cert. denied,* 505 U.S. 1219, 112 S.Ct. 3027, 120 L.Ed.2d 898 (1992). A taxpayer who brings a "good-faith pocket book action" and demonstrates that the challenged statute involves the expenditure of state tax revenues has a "direct injury." *See Cammack,* 932 F.2d at 769. The taxpayer must allege that the "direct injury" is caused by the expenditure of tax dollars. In other words, the pleadings of a valid taxpayer suit must set forth the relationship between the taxpayer, tax dollars, and the allegedly illegal government activity. *Cantrell v. City of Long Beach,* 241 F.3d 674, 683 (9th Cir.2001). However, the taxpayer need not prove that his or her tax burden will be lightened by the elimination of the questioned expenditure. *Cammack,* 932 F.2d at 769.

Under circumstances similar to those presented here, the Ninth Circuit found that plaintiffs had state taxpayer standing. In *Hoohuli v. Ariyoshi,* 741 F.2d 1169 (9th Cir.1984), both native Hawaiian and non-Hawaiian plaintiffs claimed state taxpayer standing to attack disbursements from Hawaii's General Fund to OHA. *Id.* at 1172 (noting that nine of the plaintiffs were native Hawaiian and that the two other plaintiffs were neither Hawaiian nor native Hawaiian). The plaintiffs complained that their state tax dollars were being spent on a program that disbursed benefits based on impermissible racial classifications. *Id.* at 1172. The plaintiffs asked the district court to enjoin the spending of tax monies from the state General Fund for the benefit of the alleged racial class of "Hawaiians." *Id.* For the most part, the Ninth Circuit found that this was sufficient to demonstrate a "good-faith

pocketbook action" sufficient to give the plaintiffs taxpayer standing.[6] *Id.* at 1180-81. The Ninth Circuit therefore found that the plaintiffs had standing to challenge the appropriating, transferring, and spending of taxpayers' money from the General Fund of Hawaii's treasury. *Id.*

Plaintiffs argue that, in light of *ASARCO v. Kadish,* 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989), *Hoohuli* has been effectively overruled. *See* State Defendants' Motion at 2. A plurality of the Court in *ASARCO* considered state taxpayers to be like federal taxpayers, who generally lack federal taxpayer standing. Writing for the plurality, Justice Kennedy concluded that state taxpayer standing required a showing of "direct injury, pecuniary or otherwise."[7] *Id.* at 613-14, 109 S.Ct. 2037. A "plurality opinion" is not binding on any court and does not overrule *Hoohuli. See Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 234 n. 7, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) ("an affirmance by an equally divided Court is not entitled to precedential weight"); *Hertz v. Woodman,* 218 U.S. 205, 213-14, 30 S.Ct. 621, 54 L.Ed. 1001 (1910) ("Under the precedents of this court . . . , an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting

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[6] Because the Ninth Circuit could not tell from the record whether the native Hawaiian plaintiffs received benefits from OHA that exceeded any pocketbook injury they may have suffered, the Ninth Circuit declined to determine whether the native Hawaiian plaintiffs had taxpayer standing. *Id.* at 1181.

[7] Justice Kennedy was joined by Justices Rehnquist, Stevens, and Scalia in Part II-B-1 of the opinion, the part of the opinion dealing with state taxpayer standing.

prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts"); *Jacobsen v. United States Postal Serv.*, 993 F.2d 649, 655 (9th Cir.1992) ("The Ninth Circuit has not taken pluralities as being controlling"). *Accord TranSouth Fin. Corp. v. Bell*, 149 F.3d 1292, 1297 (11th Cir.1998) ("plurality opinions of the Supreme Court do not bind this Court"). Moreover, since *ASARCO*, the Ninth Circuit has reaffirmed that *Hoohuli*, rather than Justice Kennedy's plurality opinion in *ASARCO*, is the "controlling circuit precedent." *See Cammack*, 932 F.2d at 770 n. 9.[8]

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[8] One Ninth Circuit panel suggested that it may have found the *ASARCO* plurality opinion persuasive. *See Bell v. Kellogg*, 922 F.2d 1418, 1423 (9th Cir.1991) (citing *ASARCO* (without analysis) as standing for the proposition that the same constitutional standing principles used in federal taxpayer cases "apply to those suing in federal court as state taxpayers"). However, a different Ninth Circuit panel cautioned that "*Bell* should not be interpreted as altering the law of this circuit on state taxpayer standing." *Cammack*, 932 F.2d at 770 n. 9. In any event, *Bell* could not alter the holding in *Hoohuli* without an intervening Supreme Court decision or a decision en banc. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir.2001) ("the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals"; when "a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court"); *Roundy v. Commissioner of Internal Revenue*, 122 F.3d 835, 837 (9th Cir.1997) ("A three-judge panel is bound by a prior judgment of this court unless the case is taken en banc and the prior decision is overruled").

Defendants additionally argue that state taxpayer standing under *Hoohuli* only survives in the Establishment Clause context, but Defendants cite no authority for that proposition. In the context of federal taxpayer standing, courts other than the Ninth Circuit have so restricted standing. *See Romer*, 963 F.2d at 1399. No Ninth Circuit opinion has expressly limited state taxpayer standing to Establishment Clause cases, although, since *ASARCO*, the Ninth Circuit has found taxpayer standing only in the context of Establishment Clause cases. In

(Continued on following page)

Plaintiffs allege that they pay Hawaii taxes. Complaint ¶ 9. They further allege that tax revenue of $7,154,969 was appropriated to DHHL for Fiscal Year 2001. Complaint ¶ 58(d). Without stating any particular amount in their Complaint, they further allege that tax revenues are appropriated to OHA. Complaint ¶ 62(b). Defendants concede that DHHL and OHA receive some tax revenues. Plaintiffs allege that these revenues are going to DHHL and OHA in violation of the Equal Protection Clause. Complaint ¶¶ 34, 58(d), 62(b). In *Hoohuli,* 741 F.2d at 1180, the Ninth Circuit found state taxpayer standing for plaintiffs who 1) alleged their status as taxpayers, 2) challenged the appropriating, transferring, and spending of tax money from the state's General Fund, and 3) alleged that their tax burden was increased to provide benefits to the racial class of Hawaiians. Defendants have not demonstrated that *Hoohuli* is no longer the law governing this district. Nor do they succeed in distinguishing *Hoohuli* on its facts or otherwise, as *Hoohuli* involved nearly identical allegations. Therefore, this court, following that binding Ninth Circuit precedent, concludes that Plaintiffs have standing to seek to restrain the State's expenditures of tax revenues on HHC, DHHL, and/or OHA.

Cantrell v. City of Long Beach, 241 F.3d 674 (9th Cir.2001), decided after *ASARCO,* the Ninth Circuit rejected state taxpayer standing in a non-Establishment Clause case. *Cantrell* was a case brought by birdwatchers who asserted state law claims of waste of government funds, improper public gifts, and misuse of tidelands trust assets. However, neither in that nor any other case has the Ninth Circuit expressly restricted state taxpayer standing to Establishment Clause cases.

2. *Plaintiffs Satisfy Prudential Standing Limitations for their Equal Protection Claims.*

Defendants additionally argue that, even assuming Plaintiffs have state taxpayer standing in light of *Hoohuli*, the prudential aspect of standing warrants dismissal of this case.[9] *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 468, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) ("this court has always required that a litigant have 'standing' to challenge the action. . . . The term 'standing' subsumes a blend of constitutional requirements and prudential considerations"); *Pershing Park Villas Homeowners Ass'n v. United Pacific Ins. Co.*, 219 F.3d 895, 899 (9th Cir.2000) ("At the most general level, [the standing] inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise") (quotation omitted); *Estate of McKinney v. United States*, 71 F.3d 779, 782 (9th Cir.1995) ("Standing has both constitutional and prudential limitations"); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308 (9th Cir.1982) ("the Supreme Court has further limited standing, as a prudential matter, requiring that a party assert its own rights and interests not those of third parties").

At least three prudential limitations on standing have been recognized. First, a plaintiff generally must assert his or her own legal rights and interests, and cannot rest

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[9] Without prudential limits on standing, "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. 490, 499-500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)

his or her claim to relief on the legal rights or interests of third parties. *Valley Forge,* 454 U.S. at 474-75, 102 S.Ct. 752; *Warth v. Seldin,* 422 U.S. 490, 499-500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Second, a federal court is not the forum to hear a "generalized grievance" involving a request for adjudication of abstract questions of wide public significance that are "pervasively shared and most appropriately addressed in the representative branches." *Valley Forge,* 454 U.S. at 475, 102 S.Ct. 752; *Warth,* 422 U.S. at 499, 95 S.Ct. 2197. *Accord United States v. Hays,* 515 U.S. 737, 743, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). Finally, the plaintiff's interest must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). *Accord Valley Forge,* 454 U.S. at 475, 102 S.Ct. 752. Defendants argue that this case should be dismissed on prudential grounds because it involves only a "generalized grievance."

Although Plaintiffs certainly present grievances shared in large part by most of the citizens of Hawaii, *Hoohuli* militates against dismissal of Plaintiffs' Equal Protection claims on prudential grounds. The plaintiffs in *Hoohuli* were asserting claims nearly identical to those being asserted here. In *Hoohuli,* state taxpayers also sought to enjoin expenditures of tax funds on a program (OHA) that disbursed benefits based on an allegedly impermissible racial classification. Although prudential concerns were not discussed in *Hoohuli,* the recognition by the Ninth Circuit that some of the plaintiffs had standing indicates that the panel found no problem with the prudential limits on standing. Otherwise, the Ninth Circuit should have considered prudential limits, which are an

aspect of standing that courts have an independent obligation to examine. *See Hays,* 515 U.S. at 742, 115 S.Ct. 2431 (stating that federal courts are under an independent obligation to examine their own jurisdiction, which includes a plaintiff's standing). Defendants cite no authority establishing that this independent obligation somehow excludes prudential limitations. Just as the Ninth Circuit did not dismiss the plaintiffs' claims in *Hoohuli* on prudential grounds, Plaintiffs' claims in this case should not be dismissed on prudential grounds.

3. *Plaintiffs' Taxpayer Standing is Limited to Claims that Challenge Direct Expenditures of Tax Money.*

Although Plaintiffs have taxpayer standing, that standing only supports some of their Equal Protection claims. Plaintiffs only have taxpayer standing to challenge direct expenditures of tax money by the legislature. Plaintiffs do not have standing to challenge disbursement of money from Hawaii's General Fund when the money does not come from state taxes. *See Cantrell,* 241 F.3d at 683; *Hoohuli,* 741 F.2d at 1180-81. For instance, Plaintiffs appear to challenge OHA's receipt of revenue from Ceded Land rentals first paid into Hawaii's General Fund and thereafter paid out to OHA. However, such an administrative "pass-through" does not transform rent revenues into tax revenues. Thus, Plaintiffs' taxpayer standing does not allow them to challenge that "pass-through." The "pass-through" does not give rise to a pocketbook action, as Plaintiffs are not taxed to raise that rental income. Nor is the court persuaded by Plaintiffs' argument that their taxes have been indirectly raised because, if the rent revenue from the Ceded Lands were used for other purposes, Plaintiffs would be taxed less for other purposes.

This argument is not only speculative, it ignores established law requiring a "direct injury." *See Cammack*, 932 F.2d at 769 (citing *Doremus*, 342 U.S. at 434, 72 S.Ct. 394). Plaintiffs cite no authority supporting this argument.

Plaintiffs similarly lack standing to challenge the State's payment of $30 million to the Hawaiian Home Lands Trust. That amount is being paid over time, in satisfaction of a decision by the Hawaii legislature to settle past claims relating to matters administered by DHHL. *See* Session Laws of Haw., Act 14 (Reg.Sess.1995) (establishing the Hawaiian Home Lands Trust Fund of $30,000,000 for the purpose of settling all claims against Hawaii in connection with the management, administration, supervision of, or disposition by Hawaii of the Hawaiian Home Lands). The settlement of past claims is not an improper purpose that Plaintiffs have taxpayer standing to assert.[10] If a taxpayer could challenge every settlement, a state could never resolve any dispute by agreement and

[10] Here, Plaintiffs argue that the settlement was for illegal claims. They contend that they therefore should be allowed to contest these claims. This argument is unpersuasive. Take, for example, a State employee who sues the State on the ground that a person of his race was entitled to a preference in promotions. Suppose the State decided to settle the claim by agreeing to promote the employee and paying him an extra $100 per pay period for the next twenty years. Under Plaintiffs' argument, Plaintiffs would be entitled to come into this court to challenge that settlement in any of the years following the settlement, based on taxpayer standing. Plaintiffs would argue that the settlement supports a racial preference, which is improper. But the payment was to settle a claim, regardless of the merits of the claim. To allow Plaintiffs to challenge the settlement in this manner would be tantamount to having the court review the wisdom, at any time, of every legislative decision, regardless of when made, to settle a case rather than to litigate it. While such intrusions may be warranted when standing is asserted on other grounds, Plaintiffs offer no authority that taxpayer standing goes that far.

could be forced to litigate all disputes. This particular settlement is being paid in installments, but there is no authority allowing a taxpayer to undermine a settlement just because some installments have yet to be paid. Parties rely on settlements, change their positions based on them, and refrain from other action as a result. Taxpayer standing does not provide an avenue for nullifying a settlement reached years earlier. If it did, no state could ever defer settlement payments by agreement, or agree to any resolution involving the passage of time.

For the same reason, Plaintiffs lack standing to challenge the State's issuance of bonds or other borrowing of money from the HHC, the DHHL, or OHA. Plaintiffs have not demonstrated that these acts involve the expenditure of tax funds on an improper purpose.[11]

B. *Plaintiffs' Claims as Alleged Trust Beneficiaries are Dismissed.*

Plaintiffs claim that, as beneficiaries of a public land trust, they have standing to assert breaches of that trust. At the hearing on their motion for temporary restraining order, Plaintiffs explained that the land trust they were referring to had been created by the 1898 Newlands Resolution for the benefit of all of the inhabitants of Hawaii. *See* Argument by Plaintiffs in March 12, 2002, Hearing on Plaintiffs' Motion for Temporary Restraining

[11] There may, of course, be bases other than taxpayer status through which allegedly wrongful expenditures or actions may be challenged. A person who is a direct victim of racial discrimination has such a different basis. Plaintiffs, however, have chosen to assert taxpayer standing, and Plaintiffs do not show that the narrow taxpayer basis encompasses all the challenges they bring.

Order (responding affirmatively to a question by the court as to whether Plaintiffs were attacking the alleged 1898 trust); Opposition to Motion to Dismiss (filed April 11, 2002) at 11 (arguing that the United States breached the alleged 1898 Trust in 1920, when the Hawaiian Homes Commission Act was enacted); Complaint ¶¶ 28 (alleging that the United States violated its fiduciary duty under the public land trust when it enacted the Hawaiian Homes Commission Act).[12]

Plaintiffs now change their position. In opposing the motions to dismiss, they argue that they are not attacking the 1898 trust, but instead are seeking to invalidate portions of the trust existing today, the one created in 1959 by section 5(f) of the Admissions Act.[13] *See* Argument by Plaintiffs on Present Motions (responding to questions by the court regarding which trust had allegedly been breached and unequivocally indicating that Plaintiffs' status as beneficiaries arises only from the public land trust as it exists today). Plaintiffs clarified that they are only seeking to invalidate that portion of the public land trust created by section 5(f) of the Admissions Act that pertains to the betterment of the conditions of native Hawaiians. Given their current position, the court deems Plaintiffs' public land trust claims to be limited to challenges to the trust created by the Admissions Act in 1959,

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[12] Plaintiffs also alleged that the 1898 trust was breached when Congress enacted the Admissions Act in 1959. *See* Complaint ¶ 30.

[13] Plaintiffs restated their position in apparent response to this court's order denying the motion for temporary restraining order, or to the court's concerns that Plaintiffs, not having established that they were inhabitants of Hawaii in 1920, when the United States allegedly breached the 1898 trust, may not be aggrieved beneficiaries of the 1898 trust.

i.e., the trust that exists today. All other public land trust claims alleged in the Complaint are deemed abandoned by Plaintiffs and are no longer part of this action.

Hawaii agreed to adopt the Admissions Act as part of its constitution when Hawaii became a state in 1959. *See* P.L. 86-3 (March 18, 1959), *reprinted in* 73 Stat. 4; Haw. Const. art. XII, §§ 2-3. In the Admissions Act, the United States granted Hawaii title to all public lands and public property within Hawaii, except for lands that the federal government retained for its own use. P.L. 86-3, § 5(b), 73 Stat. at 5. The public lands granted to Hawaii, as well as the proceeds and income therefrom, became lands held by Hawaii "as a public trust." Haw. Const. art. XII, § 4; *Rice v. Cayetano,* 528 U.S. 495, 507-08, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000).

The "public trust" created by the Admissions Act requires that the trust be used for one or more of the following:

> [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.

P.L. 86-3, § 5(f), 73 Stat. at 6. It is the second purpose that Plaintiffs challenge. Plaintiffs argue that, as beneficiaries of the section 5(f) public land trust, they may seek to enjoin the State Defendants and OHA from enforcing the trust's explicit purpose of bettering the conditions of native

Hawaiians, which Plaintiffs allege is an unconstitutional purpose.[14]

Although Plaintiffs claim trust beneficiary standing to bring claims for breach of the public land trust created by the Admissions Act, that legislation does not itself provide a private cause of action. *Price v. Hawaii,* 764 F.2d 623, 631 (9th Cir.1985) ("*Price I*"), *cert. denied,* 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986); *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commn.,* 588 F.2d 1216, 1220 (9th Cir.) (as amended) ("We hold that the Admission Act does not provide a private right of action") ("*Keaukaha-Panaewa I*"), *cert. denied,* 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979). Any action to enforce section 5(f) of the Admissions Act may instead be brought under 42 U.S.C. § 1983.[15] *Price I,* 764 F.2d at 628; *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commn.,* 739 F.2d 1467, 1472 (9th Cir.1984) ("*Keaukaha-Panaewa II*"). *Accord Price v. Hawaii,* 939 F.2d 702, 706 (9th Cir.1991) ("although section 5(f) itself does not provide a private right of action, an action under 42 U.S.C. § 1983 is proper") ("*Price IV*"),[16] *cert. denied,* 503 U.S. 938,

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[14] Defendants have not disputed Plaintiffs' assertion that they are beneficiaries of the public land trust created by section 5(f) of the Admissions Act. Therefore, for purposes of this motion, the court takes that assertion as true.

[15] "Section 1983 imposes two essential proof requirements upon a claimant: 1) that a person acting under color of state law committed the conduct at issue, and 2) that the conduct deprived the claimant of some right, privilege or immunity protected by the Constitution or laws of the United States." *Leer v. Murphy,* 844 F.2d 628, 632-33 (9th Cir.1988).

[16] The Ninth Circuit had ruled in several earlier matters involving Price. *See Price v. Hawaii,* 921 F.2d 950 (9th Cir.1990) ("*Price II*"); *Price v. Akaka,* 928 F.2d 824 (9th Cir.1990) ("*Price III*"), *cert. denied,* 502 U.S. 967, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991).

112 S.Ct. 1479, 117 L.Ed.2d 622 (1992); *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir.1990).

Accordingly, the Ninth Circuit has held that beneficiaries of the section 5(f) trust have standing to bring a § 1983 action against the trustees of that trust for breach of the trust. In *Price v. Akaka*, 3 F.3d 1220, 1224-25 (9th Cir.1993) ("*Price V*"), *cert. denied*, 511 U.S. 1070, 114 S.Ct. 1645, 128 L.Ed.2d 365 (1994), native Hawaiian plaintiffs challenged a referendum that would have extended benefits available under section 5(f) to all people of Hawaiian ancestry, rather than to only native Hawaiians. Because the native Hawaiian plaintiffs in *Price V* were among the class of section 5(f) beneficiaries whose welfare was at issue, the Ninth Circuit determined that they had standing to bring their § 1983 claim. *Id.* In so holding, the Ninth Circuit recognized that beneficiaries of such a trust "have the right to 'maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the trustee to redress a breach of trust.'" *Id.* at 1224 (citing Restatement (Second) of Trusts, § 199). In *Price V*, the Ninth Circuit therefore allowed the native Hawaiian plaintiffs to maintain a § 1983 claim against the trustees (the persons acting under color of state law) for breach of section 5(f) of the Admissions Act (a federal statutory right).

The Ninth Circuit had previously allowed the native Hawaiian plaintiffs in *Price I* to maintain a cause of action against the governor of Hawaii to compel him to spend section 5(f) trust money for the betterment of the conditions of native Hawaiians. *See Price I*, 764 F.2d at 629-30. Although it is not clear from the Ninth Circuit's opinion in *Price I* whether the plaintiffs had expressly invoked

§ 1983, the Ninth Circuit treated the action as based on § 1983. Immediately after noting that section 5(f) created a federal right enforceable under § 1983, the Ninth Circuit said that the plaintiffs had "properly invoked federal question jurisdiction." *Id.* at 628.

In *Price III,* the Ninth Circuit found that native Hawaiian plaintiffs had standing to assert § 1983 claims based on the section 5(f) trustees' alleged commingling of trust funds, the trustees' failure to expend those funds for the benefit of native Hawaiians, and the trustees' use of those funds for purposes other than those listed in section 5(f). *Price III,* 928 F.2d at 826-28. In *Price IV,* the Ninth Circuit similarly found standing for native Hawaiian plaintiffs to assert § 1983 claims against state officials, who, through their alleged inaction, had allowed an improper diversion of section 5(f) trust property. *Price IV,* 939 F.2d at 705-06. Again, the plaintiffs in *Price III* and *Price IV* were asserting that the trustees, state officials acting under color of law, were violating the plaintiffs' federal statutory rights under section 5(f) of the Admissions Act.

Here, unlike in the various *Price* cases, Plaintiffs are not alleging an actual breach of the trust created by section 5(f), as their claims do not involve any deviation from the terms of the section 5(f) trust. *See Price V,* 3 F.3d at 1224. Instead, Plaintiffs want this court to declare unconstitutional one of the stated purposes in section 5(f), that is, the purpose of bettering the conditions of native Hawaiians. Plaintiffs are not asserting a breach of trust, as were the claimants in the Ninth Circuit cases recognizing standing for beneficiaries of the section 5(f) trust to assert § 1983 claims for breaches of that trust.

Trust beneficiary status has no bearing on Plaintiffs' claims. Trust beneficiaries have standing to allege a breach of trust, but that is not what Plaintiffs are alleging. Instead, as "inhabitants" of Hawaii, Plaintiffs are demanding that the State ignore an express trust purpose, which Plaintiffs say violates the Equal Protection Clause. Allowing such a challenge, however, would make a nullity of standing requirements. *See Lujan,* 504 U.S. at 560-61, 112 S.Ct. 2130 (to have standing a plaintiff must show an injury in fact, a causal relationship between the injury and the challenged conduct, and a likelihood that a favorable decision will redress the alleged injury).

Plaintiffs' "breach of the public land trust" claims are nothing more than a "generalized grievance" under the Equal Protection Clause for which Plaintiffs lack standing.[17] *See Hays,* 515 U.S. at 743, 115 S.Ct. 2431 (the "rule against generalized grievances applies with as much force in the equal protection context as in any other"); *Warth,* 422 U.S. at 499, 95 S.Ct. 2197. The Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright,* 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

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[17] Plaintiffs' public land trust claims are more generalized than their taxpayer standing claims. The public land trust claims involve nearly everyone in Hawaii (with the exception of the native Hawaiians actually receiving the section 5(f) benefits). Almost anyone here in Hawaii could conceivably bring these claims. By contrast, the taxpayer claims are limited to the class of persons actually paying state taxes. Accordingly, *Hoohuli,* in which the Ninth Circuit did not dismiss taxpayer claims on prudential grounds, is distinguishable.

> *Allen v. Wright* made it clear that[,] even if a governmental actor is discriminating on the basis of race, the resulting injury "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." 468 U.S., at 755, 104 S.Ct. 3315 . . . (quoting *Heckler v. Mathews*, 465 U.S. 728, 740, 104 S.Ct. 1387, 79 L.Ed.2d 646 . . . (1984)).

Hays, 515 U.S. at 743-44, 115 S.Ct. 2431.

If Plaintiffs had been personally denied equal treatment, they would, of course, have standing to complain. But they are not proceeding on the basis of any direct injury. Instead, it is in their trust beneficiary capacities that they claim they are being treated differently from the small class of native Hawaiians. The Supreme Court has disapproved of finding standing under similar circumstances. *See Valley Forge*, 454 U.S. at 489-90 n. 26, 102 S.Ct. 752 (disapproving of standing to challenge affirmative action programs on the basis of a personal right to a government that does not deny equal protection of the laws). Accordingly, the court dismisses Plaintiffs' breach of the public land trust claims.

C. *OHA Has Not Established on This Motion that the Political Question Doctrine Justifies Dismissal of Plaintiffs' Claims or Reconsideration of this Court's Order Denying Plaintiffs' Request for a Temporary Restraining Order.*

OHA additionally argues that this court should dismiss this action as involving a nonjusticiable political question. This court may dismiss an action on the ground

that it involves a nonjusticiable political question when one of the following is "inextricable from the case:"

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).[18]

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[18] The court's consideration of OHA's political question motion overlaps the court's earlier review of prudential standing. Standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Valley Forge*, 454 U.S. at 484, 102 S.Ct. 752 (quoting *Flast*, 392 U.S. at 99, 88 S.Ct. 1942). By contrast, the political question doctrine examines whether "a particular question is beyond judicial competence, no matter who raises it." 13A Charles A. Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice & Procedure* § 3534 at 453 (2d ed.1984). However, both the political question doctrine and the "generalized grievance" limitation on prudential standing are based, at least in part, on the notion that another branch of government would be more appropriate to hear the grievance. A party lacks prudential standing to bring a "generalized grievance" involving a request for adjudication of abstract questions of wide public significance that are "pervasively shared and most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 475, 102 S.Ct. 752; *Warth*, 422 U.S. at 499, 95 S.Ct. 2197. Under the political question doctrine, courts examine whether a particular

(Continued on following page)

The gist of the claims in the Complaint is that the benefits provided by OHA and HHC/DHHL are race-based, that those benefits should therefore be analyzed under the Equal Protection Clause to see whether they pass "strict scrutiny,"[19] and that the benefits should be stopped because they are not "narrowly tailored to further a compelling governmental interest." *See Shaw v. Reno,* 509 U.S. 630, 643, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Plaintiffs argue that the restriction of benefits to Hawaiians and native Hawaiians is "presumptively invalid and can be upheld only upon an extraordinary justification." *See id.* at 643-44, 113 S.Ct. 2816.

Although most race-based preferences are subject to "strict scrutiny," preferences given to American Indian tribes are reviewed under the "rational basis" standard. *See Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). Defendants contend that this court should dismiss this action as involving a nonjusticiable political question because, in order to decide whether to apply the "strict scrutiny" or "rational basis" test, the court must decide what Defendants call the political question of

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question or issue is beyond their competence based on separation of powers concerns. *See Federal Practice & Procedure* § 3534 at 453.

[19] The Equal Protection Clause provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. On [sic] of its central purposes is to prevent the states from purposefully discriminating among individuals on the basis of race. *Shaw v. Reno,* 509 U.S. 630, 642, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Governmental action can run afoul of the Equal Protection Clause when the government explicitly classifies or distinguishes among persons by reference to impermissible criteria such as race, sex, religion, or ancestry. *De La Cruz v. Tormey,* 582 F.2d 45, 49 (9th Cir.1978), *cert. denied,* 441 U.S. 965, 99 S.Ct. 2416, 60 L.Ed.2d 1072 (1979).

whether Hawaiians and native Hawaiians are an "Indian tribe."

However, in the next breath, Defendants cite numerous cases that they say stand for the proposition that this court may apply a "rational basis" test without finding that Hawaiians and native Hawaiians are actually an "Indian tribe." *See* Office of Hawaiian Affairs Defendants' Supplemental Memorandum in Response to Questions Raised by the Court at the April 29, 2002 Hearing (filed April 29, 2002). For example, in *Alaska Chapter, Assoc. Gen. Contractors of Amer., Inc. v. Pierce,* 694 F.2d 1162 (9th Cir.1982), the Ninth Circuit applied the *Morton* analysis to benefits being provided to the indigenous people of Alaska. At the time *Pierce* was decided, those indigenous people had not been recognized by the Bureau of Indian Affairs as being "Indian tribes." *See* Bureau of Indian Affairs, Indian Tribal Entities That Have a Government to Government Relationship With the United States, 46 Fed. Regis. 35360 (1981). Nevertheless, *Pierce* applied the *Morton* analysis broadly, employing a rational basis test to benefits being provided to "any person recognized as being an Indian or Alaskan Native by a tribe, the Government, or any state." *Pierce,* 694 F.2d at 1168 n. 8. *Pierce* reasoned that, although the history of "Alaskan Natives" with the United States was different from that of "American Indians," the *Morton* analysis nevertheless applied because "Alaskan Natives" "have been considered to have the same status as other federally recognized American Indians." "Alaskan Natives" were "under the guardianship of the federal government and entitled to the benefits of the special relationship." *Id.* n. 10, 94 S.Ct. 2474.

Pierce indicates that a court may decide the applicability of the *Morton* analysis without deciding the alleged

political question of whether a group is an "Indian tribe." Accordingly, OHA has not met its burden of demonstrating that a nonjusticiable political question requires dismissal of this action. The court is not here deciding that it will apply a "rational basis" test. The court recognizes that Plaintiffs are arguing that *Pierce* has been called into doubt by *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000). However, OHA's present motion is a motion to dismiss based on nonjusticiability; this motion does not require the court to determine what test it will apply if it examines the merits of Plaintiffs' claims.[20] On OHA's nonjusticiability motion, the court instead rests its decision on OHA's failure to meet its burden of establishing that Plaintiffs present a nonjusticiable question requiring dismissal.

D. *Plaintiffs May Not Pursue Claims Challenging Real Property Tax Exemptions.*

In Paragraph 62(c) of the Complaint, Plaintiffs argue that they are harmed as taxpayers by the exemption from real property taxes given to Hawaiian Home Lands lots. Plaintiffs allege that the City & County of Honolulu and the County of Maui exempt Hawaiian Homesteads from real property taxes. *Id.* Although Plaintiffs claim that these exemptions are improper, Plaintiffs have not included the counties, the entities responsible for the real

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[20] The court is well aware that legislation is pending before Congress that, if passed, may well affect any consideration of the merits. Congress might, for example, recognize Hawaiians and/or native Hawaiians as an "Indian tribe." Additionally, Congress might recognize OHA (or some entity not associated with the State) as the body governing that "Indian tribe."

property taxes, as defendants in this case. OHA therefore moves to dismiss the real property tax claims, arguing that, under Fed.R.Civ.P. 19, the counties (the entities collecting real property taxes) are necessary parties to this case. The court need not reach this issue, however, as the remaining claims in this action are based solely on state taxpayer standing, and Plaintiffs have not alleged that their state taxes have been increased because of the real property tax exemption. Accordingly, Plaintiffs may not pursue real property tax claims.

V. *CONCLUSION.*

For the foregoing reasons, the court grants in part and denies in part Defendants' motions to dismiss for lack of standing. Except for Plaintiffs' claims based on state taxpayer standing that challenge direct expenditures of tax funds, Plaintiffs' Equal Protection claims are dismissed. All breach of public land trust claims are dismissed.

The court denies OHA's motion to dismiss (or to reconsider the finding of state taxpayer standing) based on an alleged political question. The court also denies OHA's motion to dismiss Plaintiffs' real property tax claims for failure to join the counties, as those claims are dismissed for lack of standing.

IT IS SO ORDERED.

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198 F.Supp.2d 1165

United States District Court, D. Hawai'i.

Earl F. ARAKAKI, Evelyn C. Arakaki, Edward U. Bugarin, Sandra Puanani Burgess, Patricia A. Carroll, Robert M. Chapman, Brian L. Clarke, Michael Y. Garcia, Roger Grantham, Toby M. Kravet, James I. Kuroiwa, Jr., Frances M. Nichols, Donna Malia Scaff, Jack H. Scaff, Allen H. Teshima, Thurston Twigg-Smith, Plaintiffs,

v.

Benjamin J. CAYETANO in his official capacity as Governor of the State of Hawaii, Neal Miyahira, in his official capacity as director of the Dept. of Budget and Finance, Glenn Okimoto, in his official capacity as State Comptroller and Director of Dept. of Accounting and General Services, Gilbert Coloma-Agaran, in his official capacity as Chairman of Board of Land and Natural Resources, James J. Nakatani, on his official capacity as Direcotr [sic] of Dept. of Agriculture, Seiji F. Naya, in his official capacity as director of Dept. of Business, Economic Development and Tourism, Brian Minaai, in his official capacity as Director of Dept. of Transportation, Defendants.

Haunani Apoliona, chairman, and Rowena Akana, Donald B. Cataluna, Linda Dela Cruz, Clayton Hee, Colette Y.P. Machado, Charles Ota, Oswald Stender, and John D. Waihe'e, IV in their official capacities as trustees of the Office of Hawaiian Affairs, State Defendants.

Raynard C. Soon, Chairman, and Wonda Mae Agpalsa, Henry Cho, Thomas P. Contrades, Rockne C. Freitas, Herring K. Kalua, Milton, PA, and John A.H. Tomoso, in their official capacities as members of the Hawaiian Homes Commission, OHA Defendants.

The United States of America, and John Does 1 through 10, HHCA/DHHL Defendants.

CIVIL NO. 02-00139 SOM/KSC.

March 18, 2002.

H. William Burgess, Patrick W. Hanifin, Im Hanifin Parsons, LLLC, Honolulu, HI, for plaintiffs.

Charlene M. Aina, Gerard D. Lau, Atty. Gen., Honolulu, HI, for Benjamin J. Cayetano, State Officials, Hawaiian Homes Commissioners.

Thomas A. Helper, U.S. Attorney's Office, Honolulu, HI, for U.S.

Sherry P. Broder, Davies Pacific Center, Honolulu, HI, for Trustees of Office of Hawaiian Affairs.

Robert G. Klein, McCorriston MillerMukai MacKinnon, Honolulu, HI, for SCHHA.

ORDER GRANTING PROPOSED DEFENDANT-INTERVENORS STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATION AND ANTHONY SANG, SR.'S, MOTION TO INTERVENE; ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

MOLLWAY, District Judge.

I. *INTRODUCTION.*

Plaintiffs identify themselves as individual taxpayers in Hawaii. Plaintiffs seek to stop the State of Hawaii (the "State" or "Hawaii"), the Hawaiian Homes Commission ("HHC"), the Department of Hawaiian Home Lands ("DHHL"), and the Office of Hawaiian Affairs ("OHA")

from continuing what Plaintiffs characterize as race-based actions. Specifically, Plaintiffs, some of whom are of Hawaiian ancestry, seek to stop the provision of exclusive benefits to persons of Hawaiian or native Hawaiian ancestry.[1] On the present Motion for Temporary Restraining Order (the "Motion"), Plaintiffs ask the court:

> A. To restrain HHC and DHHL from issuing any further homestead leases and from expending or encumbering any further funds from the Hawaiian Home Lands trust fund;
>
> B. To restrain the State from depositing any further funds into the Hawaiian Home Lands trust fund;
>
> C. To restrain OHA from expending or encumbering any part of the accounts or assets presently held in the "Total Fund Equity" referred to in the OHA Financial Report (11/30/2001) as totaling $337,985,289;
>
> D. To restrain the State, HHL, DHHL, and OHA from issuing any further bonds or otherwise borrowing any further money for HHC, DHHL, or OHA;
>
> E. To restrain the State from making any further payments to or for HHC, DHHL, or OHA; and
>
> F. To restrain OHA, HHC, and DHHL from expending any further public funds for lobbying,

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[1] The State Council of Hawaiian Homestead Association and Anthony Sang, Sr. (collectively "HHA Intervenors"), have moved to intervene in this action. For the reasons set forth at the hearing, HHA Intervenors' motion is granted.

advertising, or other advocacy of the allegedly racially discriminatory goals of OHA and DHHL.

The court's analysis of the Motion is divided into two parts. The court begins by looking at whether Plaintiffs have standing to bring the claims they assert. Standing is a constitutional requirement, and it is Plaintiffs' burden to show that they meet this requirement. With respect to most of the relief they request, Plaintiffs, on the present record, fail to satisfy their burden. The only claims that Plaintiffs establish standing to assert are claims that the State is disbursing tax revenue based on race, in violation of the Fourteenth Amendment. Because the court finds standing on at least one claim, the court turns to the second part of its analysis, an inquiry into whether Plaintiffs show that they are entitled to a restraining order. The answer, at least on the present record in this expedited proceeding, is "no." Plaintiffs fail to show that they are in danger of suffering any irreparable injury during the time that any temporary restraining order would be in effect. Because the present record contains no evidence that there is anything that this court needs to restrain during the period that could be covered by a temporary restraining order, the court denies the Motion.[2]

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[2] As set forth at the hearing on this motion, the court bifurcates the motion, setting Plaintiffs' motion for preliminary injunction for hearing on July 24, 2002, at 9:00 a.m.

Because of the extremely expedited briefing, the court intends to allow the parties to raise all standing issues for more orderly consideration at a hearing on April 29, 2002. Toward that end, the court extends the time for filing any motion to reconsider the standing decisions in the present order. Any motion challenging any standing ruling in the present order may be filed on or before April 2, 2002, and shall be heard on twenty-seven days' notice, rather than on the usual twenty-eight days' notice. As the court announced at the hearing on the present

(Continued on following page)

II. *FACTUAL BACKGROUND.*

The parties' differing positions are rooted in the history of Hawaii. This history has been summarized by the Supreme Court in *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000). Although scholars debate various aspects of this history, this court need not, on the present motion, resolve those debates. The court instead sets forth here a brief factual background only to put this case into context.

In the late eighteenth century, there were four different native Hawaiian kings, one ruling each of Hawaii's major islands. The Hawaiians had their own cultural and political structure. The islands were not visited by any European until 1778, when Captain James Cook, flying a British flag, made landfall. Later, in 1810, the islands were unified as one kingdom under King Kamehameha I. *Id.* at 500-01, 120 S.Ct. 1044.

Under Kamehameha I, lands were controlled by a feudal system. *Id.* at 502, 120 S.Ct. 1044. In 1839, a successor to Kamehameha I, Kamehameha III, issued the first of a series of decrees and laws designed to accommodate demands for ownership of land and security of title. Although Kamehameha III conferred freehold title to land

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Motion, the court intends to address all motions regarding standing at a hearing on April 29, 2002. Motions for reconsideration of nonstanding decisions included in the present order are due by the deadline set forth in the Local Rules. The hearing on April 29 is reserved for standing issues.

Motions to dismiss based on grounds other than standing must be filed by the deadlines set forth in court rules. By the present order, the court modifies the usual requirements for Rule 12 motions and requires that motions to dismiss based on nonstanding grounds be filed separately from motions to dismiss based on standing grounds.

on certain chiefs and other individuals, he retained vast lands for himself and directed that other extensive lands be held by the government. *Id.*

On January 17, 1893, the United States overthrew the Kingdom of Hawaii. A century later, Congress acknowledged that this overthrow was illegal, and that it deprived native Hawaiians of their right to self-determination. *See* P.L. 103-50 (November 23, 1993), *reprinted in* 107 Stat. 1510 ("Apology Resolution"). In 1894, a provisional government established the Republic of Hawaii. *Rice*, 528 U.S. at 505, 120 S.Ct. 1044.

In 1898, the "Newlands Resolution" annexed the Hawaiian Islands as a territory of the United States. *Rice,* 528 U.S. at 505, 120 S.Ct. 1044. By this resolution, the Republic of Hawaii ceded all crown, government, and public lands to the United States. 30 Stat. 750. In accepting the cession of these lands, Congress stated:

> The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided,* That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

30 Stat. 750.

In 1921, Congress enacted the Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108, setting aside

about 200,000 acres of lands ceded to the United States by the Republic of Hawaii and creating a program of loans and long-term leases for the benefit of "native Hawaiians."[3] *Rice*, 528 U.S. at 507, 120 S.Ct. 1044. The purpose of the HHCA was to "rehabilitate the native Hawaiian population." *Rice*, 528 U.S. at 507, 120 S.Ct. 1044; *see also* H.R.Rep. No. 839 at 2 (1920) (titled "Rehabilitation of Native Hawaiians") (characterizing native Hawaiians as a "Dying Race," noting that the number of full-blooded Hawaiians had dropped from 142,650 in 1826 to about 22,600 in 1919 (with an addition 16,660 people being "part Hawaiian"), and stating that the death rate was "greatly in excess of that of any other race inhabiting the islands"). The Supreme Court attributed the decline in the native Hawaiian population to the introduction of western diseases and infectious agents. *Rice*, 528 U.S. at 506, 120 S.Ct. 1044.

Additionally, a congressional Report regarding the HHCA indicated that, since the institution of private ownership of lands in Hawaii, the native Hawaiians (outside the king and the chiefs) "were granted and have held but a very small portion of the lands of the Islands." H.R.Rep. No. 839 at 6 (1920). The report noted that the "Hawaiians are not business men and have shown themselves unable to meet competitive conditions unaided." *Id.*

In 1959, when Hawaii became the fiftieth state in the union, Hawaii agreed to adopt the HHCA as part of Hawaii's constitution. Haw. Const. art. XII, §§ 2-3. The

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[3] As used in the HHCA, "native Hawaiians" was defined to include "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." 42 Stat. 108; *Rice*, 528 U.S. at 507, 120 S.Ct. 1044.

United States granted Hawaii title to all public lands and public property within the state, except for lands that the federal government retained for its own use. P.L. 86-3 (March 18, 1959), *reprinted in* 73 Stat. 4, 5 ("Admission Act"). The 200,000 or so acres set aside by the HHCA for the benefit of native Hawaiians was granted to Hawaii.[4] *Rice,* 528 U.S. at 507, 120 S.Ct. 1044. These public lands, as well as the proceeds and income therefrom, are now held by Hawaii "as a public trust." Haw. Const. art. XII, § 4; *Rice,* 528 U.S. at 507-08, 120 S.Ct. 1044. This "public trust" is to be used for one or more of the following:

> [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible [,] [4] for the making of public improvements, and [5] for the provision of lands for public use.

73 Stat. at 6; *see also Price v. Akaka,* 3 F.3d 1220, 1222 (9th Cir.1993) ("*Price V*"), *cert. denied,* 511 U.S. 1070, 114 S.Ct. 1645, 128 L.Ed.2d 365 (1994).[5] It appears that, until the late 1970s, the income from the "public trust" largely

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[4] HHC now manages these 200,000 or so acres. *See* Haw.Rev.Stat. § 10-3(3).

[5] The Ninth Circuit had ruled in several earlier matters involving Price. *See Price v. Hawaii,* 764 F.2d 623 (9th Cir.1985) ("*Price I*"), *cert. denied,* 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986); *Price v. Hawaii,* 921 F.2d 950 (9th Cir.1990) ("*Price II*"); *Price v. Akaka,* 928 F.2d 824 (9th Cir.1990) ("*Price III*"), *cert. denied,* 502 U.S. 967, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991); *Price v. Hawaii,* 939 F.2d 702 (9th Cir.1991) ("*Price IV*"), *cert. denied,* 503 U.S. 938, 112 S.Ct. 1479, 1480, 117 L.Ed.2d 622 (1992).

flowed to Hawaii's Department of Education. *See* Hawaii House Journal, S. Com. Rep. No. 672, at 1477 (1979); Hawaii Senate Journal, S. Com. Rep. No. 784, at 1351 (1979); Hawaii Senate Journal, Conf. Com. Rep. No. 77, at 998 (1979).

In 1978, OHA was established by a state constitutional amendment. *See* Haw. Const. art. XII, §§ 5-6. The purposes of OHA include 1) bettering the condition of Hawaiians and native Hawaiians,[6] 2) serving as the principal state agency responsible for the performance, development, and coordination of programs and activities relating to Hawaiians and native Hawaiians; 3) assessing the policies and practices of other agencies affecting Hawaiians and native Hawaiians; 4) applying for, receiving, and disbursing grants and donations from all sources for Hawaiian and native Hawaiian programs and services; and 5) serving as a receptacle for reparations. Haw.Rev.Stat. § 10-3. OHA was charged with the responsibility of administering and managing some of the public trust proceeds. *See Price V*, 3 F.3d at 1222.

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[6] As used in the chapter governing OHA, "Hawaiian" means "any descendent of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw.Rev.Stat. § 10-2. "Native Hawaiian," on the other hand, means "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." *Id.*

The constitutional convention committee members who drafted the proposed amendment establishing OHA stated:

> Members were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it will unite Hawaiians as a people.
>
> The present Hawaiian population is a young one. Approximately 50 percent of the total Hawaiian population is under the age of 70. The Hawaiian people today should be given the opportunity to provide for the betterment of the condition and well-being of these young Hawaiians and to address the contemporary problems that Hawaiians face – crime, inadequate housing conditions, welfare rolls and education. This proposal gives Hawaiians, a great and proud people, the opportunity and the means to do so. Your Committee feels that it is time the Hawaiians have more impact on their future.

1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13 at 1018 (1980).

In enacting laws regarding OHA, Hawaii's legislature noted that the laws might be viewed "as standing in contradiction to Hawaii's commitment to equality because it is addressed to the needs of a specific people, the Hawaiians." Hawaii Senate Journal, S. Com. Rep. No. 784, at 1351 (1979). However, Hawaii's legislature stated that it

was not its intent to be so "divisive." *Id.* Instead, the legislature stated that it intended "that the Office of Hawaiian Affairs should bring to eventual reality the equal participation of Hawaiians in the ultimate homogeneous and perfectly equal society that we seek to achieve for all posterity." *Id.*

Under Haw.Rev.Stat. §§ 10-13.5 and 10-3, OHA is funded, in part, by 20 percent of all income derived from the public land trust. *Price V*, 3 F.3d at 1222. With respect to money transferred to OHA pursuant to Hawaii's obligations under the public land trust, the Ninth Circuit has noted that the five enumerated purposes set forth above still govern OHA's use or disposal of the funds. *Id.*

III. *TEMPORARY RESTRAINING ORDER STANDARD.*

The standard for granting a temporary restraining order ("TRO") is identical to that for a preliminary injunction. *Hawai'i County Green Party v. Clinton*, 980 F.Supp. 1160, 1164 (D.Haw.1997). Accordingly, to obtain a TRO, a party must demonstrate either: 1) probable success on the merits and irreparable injury; or 2) sufficiently serious questions going to the merits to make the case a fair ground for litigation, with the balance of hardships tipping decidedly in favor of the party requesting relief.[7] *Topanga*

[7] Traditionally, there were four factors to be considered in deciding whether an injunction or restraining order should issue: 1) the likelihood of the plaintiff's success on the merits; 2) the threat of irreparable harm to the plaintiff if the injunction is not imposed; 3) the relative balance of the harm to the plaintiff and the harm to the defendant; and 4) the public interest. *Alaska v. Native Vill. of Venetie*, 856 F.2d 1384, 1388 (9th Cir.1988). These factors have been collapsed into the current test. *See id.*

Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1528 (9th Cir.1993), *cert. denied*, 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190 (1994). These two formulations represent two points on a sliding scale, with the required degree of irreparable harm increasing as the probability of success decreases. *Miller v. California Pac. Med. Ctr.*, 19 F.3d 449, 456 (9th Cir.1994). These formulations are not separate tests, but the extremes of a single continuum. *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1201 (9th Cir.1980). "If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Alaska v. Native Vill. of Venetie*, 856 F.2d 1384, 1389 (9th Cir.1988) (*quoting Aguirre v. Chula Vista Sanitary Serv.*, 542 F.2d 779 (9th Cir.1976)). If the plaintiff shows no chance of success on the merits, the injunction should not issue. Moreover, under any formulation, the moving party must demonstrate a "significant threat of irreparable injury." *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir.1987). Finally, a plaintiff must do more than merely allege imminent harm sufficient to establish standing; he or she must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief. *Associated Gen. Contractors of Cal., Inc. v. Coalition For Econ. Equity*, 950 F.2d 1401, 1410 (1991), *cert. denied*, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992).

IV. *PLAINTIFFS ARE NOT ENTITLED TO A TRO.*

Plaintiffs have standing to assert only some of the claims on which they seek relief. With respect to the narrow claims for which Plaintiffs have standing, Plaintiffs fail to demonstrate any possibility that they will be

harmed during the time period for which this court may issue a temporary restraining order. Accordingly, the court denies Plaintiffs' motion.

A. *Equal Protection Claims.*

Plaintiffs claim that the provision of benefits exclusively to Hawaiians and/or native Hawaiians by OHA, HHC, and DHHL violates the Equal Protection Clause of the Fourteenth Amendment.

1. *Plaintiffs Have Standing to Assert Some of Their Equal Protection Claims.*

Plaintiffs have standing to assert only some of their equal protection claims. The court's review of the standing issue begins with Article III, section 2, of the Constitution, which confines federal courts to deciding cases or controversies. To qualify for adjudication by a federal court, a plaintiff must show that an actual controversy exists at all stages of the case. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 63, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). No case or controversy exists if a plaintiff lacks standing to make the claims asserted. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000) (stating that standing pertains to a federal court's subject matter jurisdiction).

To have standing to maintain a claim, a plaintiff must demonstrate: 1) an injury in fact – an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical; 2) a causal relationship between the injury and the challenged conduct – an injury that is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before

the court; and 3) a likelihood, not mere speculation, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir.1996). Plaintiffs argue that they have been injured as State of Hawaii taxpayers and that they therefore have taxpayer standing for their federal equal protection claims.[8]

A state taxpayer has standing to challenge a state statute when that taxpayer is able to show that he or she "'has sustained or is immediately in danger of sustaining some direct injury as the result of [the challenged statute's] enforcement.'" *Cammack v. Waihee*, 932 F.2d 765, 769 (9th Cir.1991) (quoting *Doremus v. Board of Educ.*, 342 U.S. 429, 434, 72 S.Ct. 394, 96 L.Ed. 475 (1952)), *cert. denied*, 505 U.S. 1219, 112 S.Ct. 3027, 120 L.Ed.2d 898 (1992). A taxpayer establishes the requisite direct injury when he or she brings a "good-faith pocket book action" demonstrating that the challenged statute involves the expenditure of state tax revenues. *See Cammack*, 932 F.2d at 769. To have standing, the taxpayer must allege a direct injury caused by the expenditure of tax dollars. In other words, the pleadings of a valid taxpayer suit must set forth the relationship between the taxpayer, tax dollars, and the allegedly illegal government activity. *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir.2001).

The Ninth Circuit found that the plaintiffs in another case had taxpayer standing to bring a claim similar to

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[8] Plaintiffs do not argue that they have actually suffered discrimination. No Plaintiff, for example, claims to have applied for benefits and have been turned down solely because he or she was not native Hawaiian.

claims at issue here. In *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir.1984), the plaintiffs claimed taxpayer standing to attack OHA. The plaintiffs complained that their tax dollars were being spent on a program that disbursed benefits based on impermissible racial classifications. *Id.* at 1172. The plaintiffs asked the district court to enjoin the spending of tax monies from the state General Fund for the benefit of the alleged racial class of "Hawaiians." *Id.* For the most part, the Ninth Circuit found that this was sufficient to give the plaintiffs in *Hoohuli* taxpayer standing. *Id.* at 1180-81. The Ninth Circuit therefore found that the plaintiffs had standing to challenge the appropriating, transferring, and spending of taxpayers' money from the General Fund of the state treasury.[9] *Id.*

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[9] District courts in California have interpreted *Hoohuli* as imposing a standing requirement that a taxpayer claimant challenge the spending of money only from a state's General Fund. *See Green v. Graduate Theological Union*, 2000 WL 1639514, (N.D.Cal.2000) ("The Ninth Circuit's 'general fund' requirement for state taxpayer standing serves the same purpose – to assure that state taxpayers assert bona fide pocketbook injuries instead of impermissible generalized grievances. Without this general fund requirement, state residents could assert taxpayer status to challenge any expenditure of a state office, board, or commission. In the university context, for example, state residents could challenge the university library's purchase of certain books, or the university's programming of controversial speakers"); *Van Dyke v. Regents of Univ. of Cal.*, 815 F.Supp. 1341, 1345 (C.D.Cal.1993) ("The general fund requirement for state taxpayer standing in this Circuit serves the same purpose: to ensure that state taxpayers assert bona fide pocketbook injuries instead of impermissible generalized grievances"). Although the court recognizes the persuasive logic of these decisions, the court is not convinced at this time that Ninth Circuit precedent does indeed impose a taxpayer standing requirement that the challenge be to a General Fund expenditure. *See Cammack*, 932 F.2d at 769 (a taxpayer establishes the requisite direct injury when he or she brings a "good-faith pocket book action" demonstrating that the challenged statute involves the expenditure of state tax revenues).

In the present case, the Complaint alleges that Plaintiffs pay Hawaii taxes. Complaint ¶ 9. The Complaint further alleges that tax revenue of $7,154,969 was appropriated to DHHL for Fiscal Year 2001. Complaint § 58(d). Although the Complaint does not state any particular amount, it alleges that tax revenues are appropriated to OHA. Complaint ¶ 62(b). Defendants do not appear to be disputing that at least some tax revenues do go to DHHL and OHA. Plaintiffs allege that these funds are being spent in violation of the Equal Protection Clause. Complaint ¶¶ 34, 58(d), 62(b). These allegations sufficiently set forth the relationship between the taxpayer, tax dollars, and the allegedly illegal government activity such that Plaintiffs demonstrate taxpayer standing for their claim. *See Cantrell*, 241 F.3d at 683; *Hoohuli*, 741 F.2d at 1180-81. Accordingly, Plaintiffs have standing to seek to restrain the State's expenditures of tax revenues on HHC, DHHL, and/or OHA.

Plaintiffs bring other equal protection claims as taxpayer challenges, but Plaintiffs fail to establish standing to bring those claims. Plaintiffs may be able to establish standing as the record develops, on taxpayer or other grounds. However, on the present record, they do not do so and are therefore not entitled to an order temporarily restraining those alleged equal protection violations.

For example, Plaintiffs seek to enjoin the State from depositing any funds into the Hawaiian Home Lands trust fund. Such deposits may involve the expenditure of taxpayer money, but that is not clear at this time. Those deposits may represent funds paid in settlement of litigation. *See* Ex. Q (referring to legislation that resolves land claims involving compensation for the past use of and title to Hawaiian Home Lands). At the hearing on this Motion,

the State indicated that these deposits may include amounts promised in settlement of a lawsuit filed in the state circuit court. If the challenged deposits include litigation settlement payments, then Plaintiffs may not collaterally attack that settlement in this court. Any challenge to a settlement should have been raised in the underlying litigation, with Plaintiffs at least attempting to intervene in that underlying suit. *See generally Marino v. Ortiz*, 484 U.S. 301, 303-04, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (a divided Court affirmed the dismissal of a suit to challenge a consent decree brought by nonparties to the underlying litigation).

Plaintiffs also seek to enjoin the State from issuing any further bonds or otherwise borrowing money from HHC, DHHL, or OHA. Because the record does not show that the issuance of bonds by the State or the State's borrowing of money from HHC, DHHL, or OHA involves the expenditure of taxpayer money, the court cannot find on the present record that Plaintiffs have taxpayer standing to challenge the bond or loan programs.

Nor do Plaintiffs establish taxpayer standing to seek an injunction of 1) the issuing by HHC/DHHL of further homestead leases and the spending or encumbering of further funds from the Hawaiian Home Lands trust fund; 2) the spending or encumbering by OHA of any part of the accounts or assets presently held in the "Total Fund Equity" referred to in the OHA Financial Report (11/30/2001) as totaling $337,985,289; 3) the issuing by HHL/DHHL and OHA of any further bonds; or 4) the spending by HHL/DHHL and OHA of any further public funds for lobbying, advertising, or other advocacy of alleged racially discriminatory goals. Once again, Plaintiffs do not, on the present record, meet their burden of

showing that the above actions involve the use of tax revenues. The record indicates that DHHL and OHA, for example, receive assets or income in the form of returns on investments or rent receipts. Such money does not come directly from tax receipts. Taxpayer standing rests on the proposition that money paid by taxpayers may not be wrongfully used. If taxpayers are not the source of the funds in issue (for example, if money is instead raised through bonds or rent), then expenditures and actions may not be challenged based on taxpayer status. *See Cantrell*, 241 F.3d at 683; *Hoohuli*, 741 F.2d at 1180-81. There may, of course, be bases other than taxpayer status through which allegedly wrongful expenditures or actions may be challenged. A person who is a direct victim of racial discrimination has such a different basis. Plaintiffs, however, have chosen to assert taxpayer standing, and Plaintiffs do not show that the narrow taxpayer basis encompasses all the challenges they bring.

2. *Plaintiffs Are Not Entitled to a Temporary Restraining Order Concerning Equal Protection Claims They Do Have Standing to Bring.*

Although the court does conclude that Plaintiffs have standing to challenge at least the expenditure of taxpayer money on OHA, HHC, and DHHL, Plaintiffs have failed on this motion to show that they are entitled to an order restraining such an expenditure.

The starkest failing in Plaintiffs' Motion is its failure to establish irreparable harm in the absence of a restraining order. Plaintiffs have stated that their motion does not seek to restrain the payment of administrative costs such as rent and salaries. The court asked Plaintiffs at the

hearing on their Motion whether, in the absence of a restraining order, there would be an expenditure of taxpayer money for matters other than administrative costs during the time that a temporary restraining order could be in effect. The court noted that a temporary restraining order would be limited to ten days, unless extended. Any extension could not exceed another ten days, except by agreement of the restrained parties. *See* Fed.R.Civ.P. 65(b). Thus, the court inquired whether there would be an expenditure of taxpayer funds within the next twenty days for purposes beyond normal operating costs for OHA, HHC, and DHHL. Plaintiffs knew of no such expenditures. On this Motion, it is Plaintiffs' burden to demonstrate the imminent irreparable injury that their motion seeks to avoid. As Plaintiffs fail to meet their burden, they are not entitled to a temporary restraining order.

Even if Plaintiffs had shown that taxpayer money would be appropriated or otherwise spent in the next ten to twenty days on OHA, HHC, and/or DHHL, Plaintiffs would not be entitled to a restraining order. Such an order requires a showing of (1) a likelihood of success on the merits or (2) serious questions as to the merits, with the balance of hardships tipping decidedly in the moving party's favor. *See Tom supra*, 989 F.2d at 1528. Plaintiffs do not make either showing.

Plaintiffs argue that the use of taxpayer revenue to benefit only native Hawaiians is an impermissible type of race discrimination. Plaintiffs rest their argument primarily on *Rice*. In *Rice*, 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007, the Supreme Court faced a challenge to OHA's requirement that people voting in the election of OHA's trustees must be of Hawaiian ancestry. The statute at issue defined qualified voters as persons who could

trace their ancestry back to the inhabitants of Hawaii prior to 1778. *Id.* at 516-17, 120 S.Ct. 1044. Although the Court noted that, before 1778, people had migrated to Hawaii from various places, the Court recognized that "[a]ncestry can be a proxy for race." *Id.* at 514, 120 S.Ct. 1044. It concluded that Hawaii's electoral restriction was a "race-based voting qualification." *Id.* at 517, 120 S.Ct. 1044. Although OHA had a "unique position under state law," the Court determined that it remained "an arm of the State." *Id.* at 521, 120 S.Ct. 1044. Because the elections for OHA trustees were elections sponsored by the State, the Fifteenth Amendment, which prohibits the federal government and the states from denying or abridging the right to vote on account of race, *see id.* at 512, 120 S.Ct. 1044, prohibited Hawaii's electoral qualification based on Hawaiian ancestry. *Id.* at 522-23, 120 S.Ct. 1044.

Plaintiffs argue that the benefits from OHA and HHC/DHHL are similarly available only to those of Hawaiian ancestry. Pursuant to *Rice*, Plaintiffs contend that the restriction of benefits to those of Hawaiian ancestry violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. Its central purpose is to prevent the states from purposefully discriminating among individuals on the basis of race. *Shaw v. Reno*, 509 U.S. 630, 642, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Governmental action can run afoul of the Equal Protection Clause when the government explicitly classifies or distinguishes among persons by reference to impermissible criteria such as race, sex, religion, or ancestry. *De La Cruz v. Tormey*, 582 F.2d 45, 49 (9th Cir.1978), *cert. denied*, 441 U.S. 965, 99

S.Ct. 2416, 60 L.Ed.2d 1072 (1979). Accordingly, Plaintiffs argue that the ancestry requirements at issue here can only be upheld if they pass strict scrutiny. That is, they must be "narrowly tailored to further a compelling governmental interest." *See Shaw*, 509 U.S. at 643, 113 S.Ct. 2816. Plaintiffs argue that the present restrictions are "presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw*, 509 U.S. at 643-44, 113 S.Ct. 2816. Plaintiffs, however, have not demonstrated on the present motion that "strict scrutiny" is the appropriate standard.

More than a decade ago, now-Chief Judge David Ezra analogized native Hawaiians to American Indian tribes. Accordingly, Chief Judge Ezra did not apply "strict scrutiny" to classifications involving native Hawaiians. Instead, he applied the body of law permitting preferences to be given to American Indian tribes, *see, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), to find that the HHCA "does not create a suspect classification which offends the constitution."[10] *Naliielua v.*

[10] In *Morton*, the Supreme Court found that employment preferences given to qualified American Indians in the Bureau of Indian Affairs ("BIA") did not constitute "racial discrimination." *Morton*, 417 U.S. at 553, 94 S.Ct. 2474. The Court based this holding on "the unique legal status of Indian tribes under federal law," as well as the plenary power of Congress under Article I, § 8, cl. 3 (providing Congress with the power to regulate Commerce with the Indian tribes), to deal with the problems of Indians. *Id.* at 551-52, 94 S.Ct. 2474. The preference was therefore not granted to American Indians as a discrete racial group, but, instead, "as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554, 94 S.Ct. 2474. The Court therefore only applied a "rational basis" test to determine that the preference was constitutional. *Id.* at 555, 94 S.Ct. 2474 ("As long as the special treatment can be tied

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Hawaii, 795 F.Supp. 1009, 1012-13 (D.Haw.1990), *aff'd*, 940 F.2d 1535 (1991).

It is not clear whether *Rice* affects the viability of *Naliielua*. In *Rice*, the Court avoided deciding whether native Hawaiians are "tribes" for purposes of the *Morton* analysis. *Rice*, 528 U.S. at 519, 120 S.Ct. 1044 ("We can stay far off that difficult terrain, however"). However, *Rice* noted the difficulties attending any determination that native Hawaiians constitute a tribe. *Id.* at 518, 120 S.Ct. 1044. On this Motion, Plaintiffs have the burden of persuading this court that Plaintiffs are likely to succeed on the merits. While the court acknowledges that Plaintiffs raise serious questions going to the merits of the issues they raise, the court cannot conclude that, on the present record, Plaintiffs show a likelihood that they will succeed in establishing that "strict scrutiny" is the applicable standard governing the alleged racial discrimination. They therefore fail to demonstrate that they are likely to prevail on the merits.[11]

To obtain a temporary restraining order, Plaintiffs must do more than raise serious questions as to the merits of their equal protection claims based on the expenditure of taxes. Plaintiffs must also show that the balance of hardships tips in their favor. Although no specific expenditure of taxpayer money has been identified for the court on

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rationally to the fulfillment of Congress' unique obligations toward the Indians, such legislative judgments will not be disturbed").

[11] The court notes that the resolution of whether strict scrutiny or rational basis review is applied turns on whether native Hawaiians are a "tribe." This issue may raise a political rather than purely legal question. In any event, this court need not resolve this matter on this Motion.

this motion, the court can foresee that an injunction precluding such an expenditure would conceivably endanger programs on which many people, both native Hawaiian and otherwise, depend. Without reviewing the exact nature of each such expenditure, Plaintiffs cannot demonstrate that the balance of hardship tips in their favor. The present record does not contain the necessary material to determine that the balance of hardships tips decidedly in Plaintiffs' favor.

B. *Public Trust Doctrine Claims.*

Besides raising the equal protection claims discussed above, Plaintiffs bring claims as beneficiaries of a public land trust. The Ninth Circuit has held that native Hawaiians, as beneficiaries of a public land trust created by section 5(f) of the Admissions Act, have standing to challenge Hawaii's alleged breach of its trust obligations based on an alleged failure to use that public land trust for the betterment of the conditions of native Hawaiians.[12] *Price I*, 764 F.2d at 630. *Accord Price V*, 3 F.3d at 1224. The Ninth Circuit has recognized that beneficiaries of such a trust "have the right to 'maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the

[12] The Ninth Circuit has concluded that section 5(f) of the Admissions Act creates a right enforceable under 42 U.S.C. § 1983, *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commn.*, 739 F.2d 1467, 1472 (9th Cir.1984), even though it creates no private cause of action. *Price I*, 764 F.2d at 631. In *Keaukaha-Panaewa*, the Ninth Circuit relied on a principle enunciated in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), that the lack of an implied right of action in a federal court does not foreclose private actions under § 1983. *See Keaukaha-Panaewa*, 739 F.2d at 1471.

trustee to redress a breach of trust.'" *Price V*, 3 F.3d at 1224 (citing Restatement (Second) of Trusts, § 199).

Plaintiffs say that they are beneficiaries of a public land trust similar to the one created by section 5(f) of the Admissions Act. At the hearing, Plaintiffs clarified that their breach of the public land trust claim is based on an alleged public land trust created by the Newlands Resolution of 1898. Plaintiffs read this Resolution as permitting use of the land ceded to the United States in 1898 only "for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *See* 30 Stat. 750. Plaintiffs argue that the "inhabitants" who are the beneficiaries of the alleged 1898 Newlands Resolution trust are not restricted to native Hawaiians or Hawaiians. As there were people of many races living in Hawaii in 1898, Plaintiffs argue that the "inhabitants" who are the beneficiaries of this purported trust include people of all races, and that all Plaintiffs therefore are beneficiaries of the alleged 1898 Newlands Resolution trust.

In enacting the HHCA and the Admissions Act, Congress set forth the purposes for which the proceeds of the lands were to be used. Among these enumerated purposes was "the betterment of the conditions of native Hawaiians." Plaintiffs contend that the continuing application of these acts "for the betterment of the conditions of native Hawaiians" not only violates the Equal Protection Clause, it also impermissibly departs from the terms of the alleged 1898 Newlands Resolution trust. It is this departure that is at the heart of Plaintiffs' breach of trust claim.

The nature of Plaintiffs' attack on this departure is far from clear. Plaintiffs appear to be arguing that the federal government breached the 1898 Newlands Resolution trust

in 1920 and 1959, when the federal government imposed requirements relating to use of trust assets for Hawaiians and/or native Hawaiians. Plaintiffs do not show they have standing to bring this claim. While they may indeed be parties injured by the alleged breach, and while their injury may be traceable to the alleged breach, they do not show that their injury is likely to be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130 (to have standing a plaintiff must show an injury in fact, a causal relationship between the injury and the challenged conduct, and a likelihood that a favorable decision will redress the alleged injury).

The alleged breach was committed by the federal government in 1959, at the latest. Since that time, the federal government has not imposed or enforced any trust requirements, has not implemented any trust programs, and has not administered any trust assets or services. The court has some difficulty understanding how, in 2002, a court can hold the federal government to account for allegedly illegal laws it enacted decades ago from which it has long since divorced itself. What remedy could this court order against the federal government when it is now the State, not the federal government, that controls the programs and assets about which Plaintiffs complain? It appears to the court that, if Plaintiffs have any remedy for the alleged wrongdoing by the federal government, that remedy lies with another branch of government.[13]

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[13] Although Chief Judge David Ezra recently stated that the "United States is an indispensable party to any successful challenge to the lease provisions of the HHCA," *see Carroll v. Nakatani*, 188 F.Supp.2d 1219 (D.Haw.2001), he did not rule that, if the United States had been joined as a party, this court could then order any remedy

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Plaintiffs may be alternatively claiming that the State, HHC, DHHL, and OHA are violating the Equal Protection Clause by continuing to apply the HHCA and the Admission Act "for the betterment of the conditions of native Hawaiians." The problem with such a claim is that Plaintiffs raise it in Plaintiffs' capacity as purported trust beneficiaries suing for mismanagement of a public trust. A claim for mismanagement of a public trust must involve some deviation from the terms of the trust. *See Price V*, 3 F.3d at 1224. Plaintiffs, however, are complaining that trustees are complying with express trust requirements that trust assets be used for the betterment of native Hawaiians. Far from alleging that these trustees are violating the terms of the trust as set forth in the HHCA and the Admission Act, Plaintiffs are arguing that the trustees should ignore certain terms of those laws and instead comply with what Plaintiffs allege is the "true" trust created in 1898 by the Newlands Resolution. The present trustees, however, were never trustees of the 1898 Newlands Resolution trust. The present trustees are charged with enforcing the present trust, which is a modified version of what was in effect in 1898. Plaintiffs' claim turns out to be an attempt to have the present trustees ignore the modifications, on the ground that they violate the Constitution. This is not a claim that a trust beneficiary may pursue on trust mismanagement grounds.

Defendants view the problem with Plaintiffs' breach of trust claim as one of standing. It is not clear to this court that the problem is a lack of standing, as opposed to a failure to state a claim. Regardless of whether this matter

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against the federal government for having promulgated the HHCA or the Admission Act.

is better viewed under Rule 12(b)(1) or Rule (b)(6), the court, on the present record, is not persuaded that Plaintiffs may pursue their breach of trust claim in their capacities as purported trust beneficiaries.

This is not to say, of course, that Plaintiffs have no avenue for claiming that Defendants are violating the Equal Protection Clause by applying the HHCA and the Admission Act. As the court noted in connection with Plaintiffs' equal protection claims, claims may still be brought by parties who suffer actual discrimination. Plaintiffs could, for example, apply for benefits, and, if turned down on the basis of race, possibly assert standing on the basis of such a denial. This possibility was discussed by Chief Judge David Ezra in the consolidated cases of *Carroll v. Nakatani*, Civil No. 01-00641 DAE/KSC, and *Barrett v. Hawaii*, Civil No. 01-00645 DAE/KSC. Beneficiary status, by contrast, concerns attempts to compel compliance with the terms of the trust that the trustees are charged with administering.[14] Plaintiffs appear to be trying to require the present trustees to deviate from present trust terms and instead to implement the terms of the alleged 1898 Newlands Resolution trust, which Plaintiffs see as the only "true" trust.

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[14] Citing *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957), Plaintiffs additionally argue that the government, while acting as trustee of a land trust, cannot enforce privately created racial classifications. However, on this motion, Plaintiffs fail to demonstrate standing to make this argument. *Pennsylvania*, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792, involved plaintiffs who claimed to have been victims of actual discrimination, as opposed to trust beneficiaries claiming mismanagement of the trust.

Because this issue is likely to be the subject of further proceedings, the court also notes that it is concerned that the Newlands Resolution may not have actually created the trust alleged by Plaintiffs. Plaintiffs claim that this trust only allows the land ceded to the United States in 1898 to be used "for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *See* 30 Stat. 750. Plaintiffs, however, cite no binding authority that directly supports the proposition that a public land trust was established by that Resolution. At most, Plaintiffs cite an opinion by the Attorney General. *See* Ex. AA. However, that opinion does not conclude that a public land trust governing management and disposition of the land was created by the Newlands Resolution.

After accepting the cession of crown, government, and public lands in the Newlands Resolution, Congress stated that it would

> enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same [with exceptions] . . . , shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

30 Stat. 750. The Newlands Resolution therefore placed restrictions on revenue and proceeds from the public lands. As recognized by the Attorney General opinion cited by Plaintiffs, however, this restriction did not affect the previous clause, which conferred upon Congress the power to manage and dispose of the lands. *See* Ex. AA at 576.

Even assuming that a public land trust was created by the 1898 Newlands Resolution, Plaintiffs have not demonstrated that Congress exceeded its power to manage or dispose of the ceded lands through the HHCA or the

Admission Act. Nor have Plaintiffs demonstrated that the betterment of the conditions of native Hawaiians is not a "public purpose" for which the Newlands Resolution would allow use of the revenue and proceeds derived from the ceded land.[15] Accordingly, Plaintiffs have failed to demonstrate that they are likely to succeed on the merits of their public land trust claim. Even assuming that Plaintiffs raise serious questions as to those merits, the balance of hardships appears to favor Defendants. *See, e.g.*, Declaration of Jobie M.K.M. Yamaguchi (undated but filed as part of State's Opposition) (discussing the hardships that a restraining order on the HHC and DHHL would cause).

Given all of the court's concerns, a TRO is not warranted based on Plaintiffs' public land trust theory of the case.

V. *CONCLUSION.*

For the foregoing reasons, Plaintiffs' motion for a temporary restraining order is denied. The HHA Intervenors' motion to intervene is granted.

IT IS SO ORDERED.

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[15] At the time the HHCA was passed, for example, Congress noted that the HHCA was to "rehabilitate the native Hawaiian population," which it characterized as a "dying race." *see* H.R.Rep. No. 839 at 2 (1920). Congress indicated that, since the institution of private ownership of lands in Hawaii, the native Hawaiians (outside the King and the chiefs) "were granted and have held but a very small portion of the lands of the Islands." *Id.* at 6. The report noted that the "Hawaiians are not business men and have shown themselves unable to meet competitive conditions unaided." *Id.*

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL F. ARAKAKI; EVELYN C. ARAKAKI; EDWARD U. BUGARIN; SANDRA P. BURGESS; PATRICIA A. CARROLL; ROBERT M. CHAPMAN; MICHAEL Y. GARCIA; TOBY M. KRAVET; JAMES I. KUROIWA; FRANCES M. NICHOLS; DONNA MALIA SCAFF; JACK H. SCAFF; ALLEN TESHIMA; THURSTON TWIGG-SMITH,

Plaintiffs-Appellants,

ANTHONY SANG, SR., State Council of Hawaiian Homestead Associations (SCHHA); STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS,

Intervenors-Appellees,

v.

HAUNANI APOLIONA, Chairman, and in her official capacity as trūstee of the Office of Hawaiian Affairs; ROWENA AKANA, in his official capacity as trustee of the Office of Hawaiian Affairs; DONALD CATALUNA, in his

No. 04-15306

D.C. No. CV-02-00139-SOM/KSC
District of Hawaii, Honolulu

ORDER

(Filed Nov. 4, 2005)

official capacity as trustee of the Office of Hawaiian Affairs; LINDA DELA CRUZ, in her official capacity as trustee of the Office of Hawaiian Affairs; CLAYTON HEE, in his official capacity as trustee of the Office of Hawaiian Affairs; COLETTE Y. MACHADO, in her official capacity as trustee of the Office of Hawaiian; CHARLES OTA, in his official capacity as trustee of the Office of Hawaiian Affairs; OSWALD K STENDER, in his official capacity as trustee of the Office of Hawaiian Affairs; JOHN D. WAIHEE, IV, in his official capacity as trustee of the Office of Hawaiian Affairs; UNITED STATES OF AMERICA; JOHN DOES, 1 through 10; LINDA C. LINGLE, in her official capacity as Governor of the State of Hawaii; GEORGINA KAWAMURA, in her official capacity as Director of the Department of Budget and Finance; RUSS SAITO, in her official capacity as Comptroller and Director of the Department of Accounting and General Services; PETER YOUNG, in his official capacity as Chairman of the Board of Land and Natural Resources; SANDRA LEE KUNIMOTO, in her official as Director of the Department of

Argiculture [sic]; TED LIU, in his official capacity as Director of the Department of Business, Economic Development and Tourism; RODNEY HARAGA, in his official capacity as Director of the Department of Transportation; QUENTIN KAWANANAKOA, member of the Hawaiian Homes Commission,

Defendants-Appellees.

Before: BRUNETTI, GRABER, and BYBEE, Circuit Judges.

The panel judges have voted to deny Arakaki's petition for rehearing. Judges Graber and Bybee voted to deny the petition for rehearing en banc, and Judge Brunetti recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Arakaki's petition for rehearing and petition for rehearing en banc, filed October 11, 2005, is DENIED.

CONSTITUTION OF THE UNITED STATES

ARTICLE III

* * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

THE ADMISSION ACT
(Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4)
Section 4

As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, . . . ; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

THE ADMISSION ACT
(Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4)
Section 5

* * *

(b) Except as provided in subsections (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United

States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. . . . .

* * *

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. . . . .

* * *

HAWAIIAN HOMES COMMISSION ACT, 1920
TITLE 2 HAWAIIAN HOMES COMMISSION
Section 201 Definitions.

(a) When used in this title:

* * *

"[n]ative Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

* * *

HAWAIIAN HOMES COMMISSION ACT, 1920
TITLE 2 HAWAIIAN HOMES COMMISSION
Section 202 Department officers, staff, commission, members, compensation.

(a) There shall be a department of Hawaiian home lands which shall be headed by an executive board to be known as the Hawaiian homes commission. . . . . The commission shall be composed of nine members . . . . The governor shall appoint the chairman of the commission from among the members thereof.

The commission may delegate to the chairman such duties, powers, and authority or so much thereof, as may be lawful or proper for the performance of the functions vested in the commission. . . . .

* * *

HAWAIIAN HOMES COMMISSION ACT, 1920
TITLE 2 HAWAIIAN HOMES COMMISSION
Section 203 Certain public lands designated "available lands.".

All public lands of the description and acreage, as follows, . . . are hereby designated, and hereinafter referred to, as "available lands":

* * *

HAWAIIAN HOMES COMMISSION ACT, 1920
TITLE 2 HAWAIIAN HOMES COMMISSION
Section 204 Control by department of "available lands," return to board of land and natural resources, when; other lands, use of.

(a) Upon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the department to be used and disposed of in accordance with the provisions of this Act, except that:

* * *

HAWAIIAN HOMES COMMISSION ACT, 1920
TITLE 2 HAWAIIAN HOMES COMMISSION
Section 207 Leases to Hawaiians, licenses.

(a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not more than forty acres of agriculture lands or lands used for aquaculture

purposes; or (2) not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands; or (3) not more than one acre of any class of land to be used as a residence lot; . . . .

* * *

HAWAIIAN HOMES COMMISSION ACT, 1920
TITLE 2 HAWAIIAN HOMES COMMISSION
Section 208 Conditions of leases.

Each lease made under the authority granted the department by section 207 of this Act, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(1) The original lessee shall be a native Hawaiian, not less than eighteen years of age. . . . .

(2) The lessee shall pay a rental of $1 a year for the tract and the lease shall be for a term of ninety-nine years; except that the department may extend the term of any lease; provided that . . . .

* * *

THE CONSTITUTION OF THE STATE OF HAWAII
ARTICLE XII. HAWAIIAN AFFAIRS
HAWAIIAN HOMES COMMISSION ACT
Section 1

Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920,

enacted by the Congress, as the same has been or may be amended prior to the admission of the State, is hereby adopted as a law of the State, subject to amendment or repeal by the legislature; provided that if and to the extent that the United States shall so require, such law shall be subject to amendment or repeal only with the consent of the United States and in no other manner; provided further that if the United States shall have been provided or shall provide that particular provisions or types of provisions of such Act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended. The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of such Act. The legislature shall make sufficient sums available for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, aquaculture, farm and ranch loans; (3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) the administration and operating budget of the department of Hawaiian home lands; in furtherance of (1), (2), (3) and (4) herein, by appropriating the same in the manner provided by law.

* * *

[Ren and am Const Con 1978 and election Nov 7, 1978]

THE CONSTITUTION OF THE STATE OF HAWAII
ARTICLE XII. HAWAIIAN AFFAIRS
ACCEPTANCE OF COMPACT
Section 2

The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that section 1 hereof be included in this constitution, in whole or in part, it being intended that the Act or acts of the Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

[Ren and am Const Con 1978 and election Nov 7, 1978]

THE CONSTITUTION OF THE STATE OF HAWAII
ARTICLE XII. HAWAIIAN AFFAIRS
COMPACT ADOPTION; PROCEDURES AFTER ADOPTION
Section 3

As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the constitution of this State, as provided in section 7, subsection (b), of the Admission Act, subject to amendment or repeal only with the consent of the United States, and in no other manner; provided that (1) sections 202, 213, 219, 220, 222, 224 and 225 and other provisions relating to administration, and

paragraph (2) of section 204, sections 206 and 212 and other provisions relating to the powers and duties of officers other than those charged with the administration of such Act, may be amended in the constitution, or in the manner required for state legislation, . . . ; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for state legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands," as defined by such Act, shall be used only in carrying out the provisions of such Act.

[Add 73 Stat 4 and election June 27, 1959; ren and am Const Con 1978 and election Nov 7, 1978]

THE CONSTITUTION OF THE STATE OF HAWAII
ARTICLE XII. HAWAIIAN AFFAIRS
PUBLIC TRUST
Section 4

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

[Add Const Con 1978 and election Nov 7, 1978]

THE CONSTITUTION OF THE STATE OF HAWAII
ARTICLE XII. HAWAIIAN AFFAIRS
OFFICE OF HAWAIIAN AFFAIRS; ESTABLISHMENT OF BOARD OF TRUSTEES
Section 5

There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters . . . , as provided by law.

[Add Const Con 1978 and election Nov 7, 1978]

THE CONSTITUTION OF THE STATE OF HAWAII
ARTICLE XII. HAWAIIAN AFFAIRS
POWERS OF BOARD OF TRUSTEES
Section 6

The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator

of the Office of Hawaiian Affairs, who shall be appointed by the board.

[Add Const Con 1978 and election Nov 7, 1978]

HAWAII REVISED STATUTES
DIVISION 1. GOVERNMENT.
TITLE 1. GENERAL PROVISIONS.
CHAPTER 10. OFFICE OF HAWAIIAN AFFAIRS.
PART I. GENERAL PROVISIONS.

§ 10-1 Declaration of purpose.

(a) The people of the State of Hawaii and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, betterment of conditions for native Hawaiians. The people of the State of Hawaii reaffirmed their solemn trust obligation and responsibility to native Hawaiians and furthermore declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawaii.

(b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.

[L 1979, c 196, pt of § 2]

§ 10-2 Definitions.

In this chapter, if not inconsistent with the context:

"Administrator" means the administrator of the office of Hawaiian affairs.

"Beneficiary of the public trust entrusted upon the office" means native Hawaiians and Hawaiians.

"Board" means the board of trustees.

"Grant" means an award of funds by the office to a specified recipient to support the activities of the recipient for activities that are consistent with the purposes of this chapter.

"Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

"[n]ative Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

"Office" means the office of Hawaiian affairs.

"Recipient" means any organization or person receiving a grant.

[L 1979, c 196, pt of § 2; 1990 amendments not in effect; am L 1992, c 318, § 2; am L 1997, c 350, §§ 14, 15; am L 2002, c 182, § 2]

§ 10-3 Purpose of the office.

The purposes of the office of Hawaiian affairs include:

(1) The betterment of conditions of native Hawaiians: A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians. For the purpose of this chapter, the public land trust shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admission Act), (excluding therefrom lands and all proceeds and income from the sale, lease, or disposition of lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended), and all proceeds and income from the sale, lease, or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act of March 18, 1959, later conveyed to the State under section 5(e).

(2) The betterment of conditions of Hawaiians;

(3) Serving as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; except that the Hawaiian Homes

Commission Act, 1920, as amended, shall be administered by the Hawaiian homes commission;

(4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;

(5) Applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and

(6) Serving as a receptacle for reparations.

[L 1979, c 196, pt of § 2; 1990 amendments not in effect]

§ 10-4 Office of Hawaiian affairs; established; general powers.

There shall be an office of Hawaiian affairs constituted as a body corporate which shall be a separate entity independent of the executive branch. The office, under the direction of the board of trustees, shall have the following general powers:

(1) To adopt, amend, and repeal bylaws governing the conduct of its business and the performance of the powers and duties granted to or imposed upon it by law;

(2) To acquire in any lawful manner any property, real, personal, or mixed, tangible or intangible, or any interest therein; to hold, maintain, use, and operate the same; and to sell, lease, or otherwise dispose of the same at such time, in such manner and to the extent necessary or appropriate to carry out its purpose;

(3) To determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to the office of Hawaiian affairs;

(4) To enter into and perform such contracts, leases, cooperative agreements, or other transactions with any agency or instrumentality of the United States, or with the State, or with any political subdivision thereof, or with any person, firm, association, or corporation, as may be necessary in the conduct of its business and on such terms as it may deem appropriate;

(5) To execute, in accordance with its bylaws, all instruments necessary or appropriate in the exercise of any of its powers;

* * *

(9) To take such actions as may be necessary or appropriate to carry out the powers conferred upon it by law.

[L 1979, c 196, pt of § 2; am L 1994, c 283, § 3]

§ 10-5 Board of trustees; powers and duties.

The board shall have the power in accordance with law to:

(1) Manage, invest, and administer the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 10-3;

(2) Exercise control over real and personal property set aside to the office by the State of Hawaii, the United States of America, or any private sources, and transferred to the office for native Hawaiians and Hawaiians;

(3) Collect, receive, deposit, withdraw, and invest money and property on behalf of the office;

(4) Formulate policy relating to the affairs of native Hawaiians and Hawaiians, provided that such policy shall not diminish or limit the benefits of native Hawaiians under article XII, section 4, of the state Constitution;

(5) Otherwise act as a trustee as provided by law;

(6) Delegate to the administrator, its officers and employees such powers and duties as may be proper for the performance of the powers and duties vested in the board;

(7) Provide grants to individuals, and public or private organizations to better the conditions of native Hawaiians and Hawaiians consistent with the standards set forth in section 10-17;

(8) Make available technical and financial assistance and advisory services to any agency or private organization for native Hawaiian and Hawaiian programs, and for other functions pertinent to the purposes of the office of Hawaiian affairs. Financial assistance may be rendered through contractual arrangements as may be agreed upon by the board and any such agency or organization; and

* * *

[L 1979, c 196, pt of § 2; 1990 amendments not in effect; am L 1996, c 240, § 1; am L 2002, c 182, § 3]

10-6 General duties of the board.

(a) The general duties of the board shall be:

(1) To develop, implement, and continually update a comprehensive master plan for native Hawaiians and Hawaiians which shall include, but not be limited to, the following:

(A) Compilation of basic demographic data on native Hawaiians and Hawaiians;

(B) Identification of the physical, sociological, psychological, and economic needs of native Hawaiians and Hawaiians;

(C) Establishment of immediate and long-range goals pursuant to programs and services for native Hawaiians and Hawaiians;

(D) Establishment of priorities for program implementation and of alternatives for program implementation; and

(E) Organization of administrative and program structure, including the use of facilities and personnel;

(2) To assist in the development of state and county agency plans for native Hawaiian and Hawaiian programs and services;

(3) To maintain an inventory of federal, state, county, and private programs and services for Hawaiians and native Hawaiians and act as a clearinghouse and referral agency;

(4) To advise and inform federal, state, and county officials about native Hawaiian and Hawaiian programs, and coordinate federal, state, and county activities relating to native Hawaiians and Hawaiians;

(5) To conduct, encourage, and maintain research relating to native Hawaiians and Hawaiians;

(6) To develop and review models for comprehensive native Hawaiian and Hawaiian programs;

(7) To act as a clearinghouse for applications for federal or state assistance to carry out native Hawaiian or Hawaiian programs or projects;

(8) To apply for, accept and administer any federal funds made available or allotted under any federal act for native Hawaiians or Hawaiians; and

(9) To promote and assist the establishment of agencies to serve native Hawaiians and Hawaiians.

(b) The board shall have any powers which may be necessary for the full and effective performance and discharge of the duties imposed by this chapter, and which may be necessary to fully and completely effectuate the purposes of this chapter.

[L 1979, c 196, pt of § 2]

§ 10-7 Board of trustees.

The office of Hawaiian affairs shall be governed by a board to be officially known as the board of trustees, office of Hawaiian affairs. Members of the board shall be elected in accordance with chapter 13D, with reference to sections 11-15, 11-25, 12-5, 12-6, and vacancies shall be filled in accordance with section 17-7.

[L 1979, c 196, pt of § 2]

* * *

§ 10-10 Administrator; appointment, tenure, removal.

The board by a majority vote, shall appoint an administrator who shall serve without regard to the provisions of chapter 76 for a term to be determined by the board. The board, by a two-thirds vote of all members to which it is entitled, may remove the administrator for cause at any time.

[L 1979, c 196, pt of § 2; am L 2000, c 253, § 150]

* * *

§ 10-13 Appropriations; accounts; reports.

(a) Moneys appropriated by the legislature for the office shall be payable by the director of finance, upon vouchers approved by the board, or by any officer elected or appointed by the board and authorized by the board to approve the vouchers on behalf of the board. All moneys received by or on behalf of the board shall be deposited with the director of finance and kept separate from moneys in the state treasury; except that any moneys received from the federal government or from private contributions shall be deposited and accounted for in accordance with conditions established by the agencies or persons from whom the moneys are received; and except that with the concurrence of the director of finance, moneys received from the federal government for research, training, and other related purposes of a transitory nature, and moneys in trust or revolving funds administered by the office, shall be deposited in depositories other than the state treasury and shall be reported on to the state comptroller under section 40-81, and rules prescribed thereunder.

(b) Income derived from the sale of goods or services and income from lands and property as described in

section 10-3, shall be credited to special or other funds; provided that upon the recommendation of the office, the comptroller shall establish such other separate accounts or special funds for other designated revenues as may be directed by the board or its authorized representative.

[L 1979, c 196, pt of § 2; am L 1981, c 37, § 2; 1990 amendments not in effect]

§ 10-13.5 Use of public land trust proceeds.

Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter.

[L 1980, c 273, § 1; 1990 amendments not in effect]

* * *

§ 10-16 Suits.

(a) The office may sue and be sued in its corporate name. The State shall not be liable for any acts or omissions of the office, its officers, employees, and the members of the board of trustees, except as provided under subsection (b).

(b) In matters of tort, the office, its officers and employees, and the members of the board shall be subject to suit only in the manner provided for suits against the State under chapter 662.

(c) In matters of misapplication of funds and resources in breach of fiduciary duty, board members shall be subject to suit brought by any beneficiary of the public trust entrusted upon the office, either through the office of the attorney general or through private counsel.

(d) In matters involving other forms of remedies, the office, its officers and employees, and the members of the board shall be subject to suit as provided by any other provision of law and by the common law.

[L 1979, c 196, pt of § 2]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL F. ARAKAKI; EVELYN C. ARAKAKI; EDWARD U. BUGARIN; SANDRA P. BURGESS; PATRICIA A. CARROLL; ROBERT M. CHAPMAN; MICHAEL Y. GARCIA; TOBY M. KRAVET; JAMES I. KUROIWA; FRANCES M. NICHOLS; DONNA MALIA SCAFF; JACK H. SCAFF; ALLEN TESHIMA; THURSTON TWIGG-SMITH,

Plaintiffs-Appellants,

ANTHONY SANG, SR., State Council of Hawaiian Homestead Associations (SCHHA); STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS,

Intervenors-Appellees,

v.

HAUNANI APOLIONA, Chairman, and in her official capacity as trustee of the Office of Hawaiian Affairs; ROWENA AKANA, in his official capacity as trustee of the Office of Hawaiian Affairs; DONALD CATALUNA, in his

No. 04-15306

D.C. No. CV-02-00139-SOM/KSC
District of Hawaii, Honolulu

ORDER

(Filed Nov. 21, 2005)

official capacity as trustee of the Office of Hawaiian Affairs; LINDA DELA CRUZ, in her official capacity as trustee of the Office of Hawaiian Affairs; CLAYTON HEE, in his official capacity as trustee of the Office of Hawaiian Affairs; COLETTE Y. MACHADO, in her official capacity as trustee of the Office of Hawaiian; CHARLES OTA, in his official capacity as trustee of the Office of Hawaiian Affairs; OSWALD K STENDER, in his official capacity as trustee of the Office of Hawaiian Affairs; JOHN D. WAIHEE, IV, in his official capacity as trustee of the Office of Hawaiian Affairs; UNITED STATES OF AMERICA; JOHN DOES, 1 through 10; LINDA C. LINGLE, in her official capacity as Governor of the State of Hawaii; GEORGINA KAWAMURA, in her official capacity as Director of the Department of Budget and Finance; RUSS SAITO, in her official capacity as Comptroller and Director of the Department of Accounting and General Services; PETER YOUNG, in his official capacity as Chairman of the Board of Land and Natural Resources; SANDRA LEE KUNIMOTO, in her official as Director of the Department of

Argiculture [sic]; TED LIU, in his official capacity as Director of the Department of Business, Economic Development and Tourism; RODNEY HARAGA, in his official capacity as Director of the Department of Transportation; QUENTIN KAWANANAKOA, member of the Hawaiian Homes Commission,

Defendants-Appellees.

Before: BRUNETTI, GRABER, and BYBEE, Circuit Judges.

The State of Hawaii's, and the Department of Hawaiian Home Lands and the Hawaiian Homes Commission's ("State Appellees") motion for a stay of mandate pending the filing of a petition for writ of certiorari is hereby GRANTED. Fed. R. App. P. 41(b).

Therefore, it is ordered that the mandate is stayed pending the filing of a petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court.

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(3)

No. 05-988

Supreme Court, U.S.
FILED
MAR 7 - 2006
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In The

Supreme Court of the United States

LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAII,

Petitioner,

v.

EARL F. ARAKAKI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this already long-delayed case, 4 years old and still enmeshed in litigating the threshold issue of standing, should be "held" further pending this Court's decision in *Daimler-Chrysler v. Cuno*.

2. Whether the time has come for this Court, respondents' last hope for a just and speedy adjudication, to take charge, resolve the standing questions and allow this important case to move forward to judgment on the merits.

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INTRODUCTION

Respondents are fourteen individual citizens of Hawaii and the United States of America who, as state taxpayers and beneficiaries of Hawaii's ceded lands trust, came to federal court four years ago, seeking relief from a broad and patently offensive regime of racial discrimination and breach of fiduciary duty by the State of Hawaii and its officials.

Respondents have just filed a conditional cross-petition for certiorari and do not oppose, indeed they welcome, this Court's review of *all* the "standing" issues in this case.

They oppose the granting of a writ of certiorari *only* to the petitioner and also oppose the request that this Court *hold* the petition(s) for certiorari in this case "pending this Court's ruling in the *Cuno* case." (See petition for certiorari, conclusion at 20, 21.)

Mindful of the admonition in Sup. Ct. Rule 15.2, respondents point out and respond to perceived misstatements in the petition.

RESPONSE TO PERCEIVED MISSTATEMENTS

A. Respondents have standing, not "simply because they pay taxes to the state," but because they are denied equal treatment which causes injury to their pocketbooks.

The petition casts the "question presented" as whether state taxpayers have standing "simply because they pay taxes to the state."

Respondents never made such a claim. Rather, their complaint, as taxpayers, is that the state does not treat all taxpayers equally: It singles out respondents and other taxpayers similarly situated and denies them the benefit of the part of their taxes used exclusively for those of the favored racial ancestry. (See Complaint, Cross-Pet. App. 71, 101 and 104.) The aggregate injury to the state treasury and to the pocketbooks of respondents, and other taxpayers similarly situated, to date is over $1 billion and is ongoing and escalating. (Cross-Pet. App. 16, 17 & 19.)

Neither the trial court nor the court of appeals upheld respondents' standing as taxpayers "simply because they pay taxes to the state." Both cited the Ninth Circuit's leading case on state taxpayer standing, *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984), which relied on this Court's well-established rule in *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).

> The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. (Internal citations omitted.)
>
> . . .
>
> The taxpayer's action can meet this test but only when it is a good-faith pocketbook action.

The question which petitioner seems to be asking, at 15, 16 of the petition, is whether, in light of Justice Kennedy's opinion in *ASARCO v. Kadish*, 490 U.S. 605, 613-14 (1989), *Doremus* is still good law. If so, that is a puzzling argument because the words of Justice Kennedy cited in

the petition at 11, confirm that *Doremus* is alive and well and that state taxpayers who show a "direct injury," pecuniary or otherwise, do indeed have standing in federal court.

However petitioner chooses to phrase the question, respondents welcome this Court's review, along with the other "standing" questions, of the state taxpayer claim as set out in the Complaint to judge whether it alleges a "good-faith pocketbook" injury. Consider, for example, these allegations of the complaint,

> ¶62.b. **Appropriations for OHA[1] harm Plaintiffs as taxpayers**. . . . Although each Plaintiff's tax burden is increased by the appropriations to OHA, and the appropriations to pay principal and interest on bonds that generated funds that have been appropriated to OHA, each Plaintiff is denied any benefit of the portions set aside for "native Hawaiians" solely because of his or her ancestry, i.e., none of the Plaintiffs have the required one-half part of the favored racial ancestry. (Cross-Pet. App. 104.)

See also Complaint ¶58, particularly d., for allegations of specific injury suffered by each plaintiff, as a taxpayer, resulting from implementation of the HHCA/DHHL laws. (Cross-Pet. App. 98-101.)

As this Court teaches in *Warth v. Seldin*, 422 U.S. 490, 501 (1975), plaintiffs must allege a distinct and palpable injury even if it is shared by a large class of other

---

[1] The State of Hawaii's Office of Affairs, established by HRS Chapter 10 to serve the interests of Hawaiians and native Hawaiians. These classifications have been held by the U.S. Supreme Court to be racial. *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000).

possible litigants, but so long as this requirement is satisfied, may have standing to seek relief on the basis of the legal rights and interests of others and, indeed, may invoke the public interest in support of their claim.

B. Following annexation, Hawaiians' numbers increased steadily and they achieved political success.

The petition asserts a litany of suffering leading to the enactment of HHCA in 1921, at page 4, paragraph 2, including, "drastic reductions in their native population" and "political disempowerment."

It is true and sad that the Hawaiian population in Hawaii declined precipitously during the years of the Kingdom, but the historic fact is that it then reversed and rose steadily after annexation in 1898. (Schmitt, *Demographic Statistics of Hawaii, 1778-1965*, Cross-Pet. App. 7.) One of the benefits to Hawaiians after annexation was voting power they had never had under the monarchy. All of them became U.S. citizens and the male members of the Hawaiian population, like all other male citizens of America, gained the right to vote. Up until 1922, Hawaiians, representing the majority of voters, controlled the Hawaii Legislature. They continued until 1938 to be the largest bloc of voters. As late as 1927, Hawaiians held 46 percent of appointed executive positions in the territorial government and 55 percent of clerical and other government jobs. More than half of the judgeships and elective offices were filled by people of Hawaiian ancestry. *Hawaiian Sovereignty: Do The Facts Matter?* Twigg-Smith, 1998 at 131, 132.

C. Admission Act §5(f) says "one or more". It does not require any additional special treatment for native Hawaiians or for any one of the other four purposes.

The petition asserts, at page 4, paragraph 3, that in 1959 Congress directed that the ceded lands be held in a public trust "for five purposes, including 'the betterment of the condition of native Hawaiians'", citing §5(f) of the Admission Act. However §5(f) directed that the ceded lands be used for "one or more" of the five purposes. Other than the Hawaiian Homes Commission Act and the 200,000 acres of "available lands" under §4, nothing in the Admission Act required any of the ceded lands or their revenues to be used for "native Hawaiians" or for any one of the other four purposes.

D. It is doubtful that the people of Hawaii adopted the 1978 OHA amendments.

At page 5, the petition says, "In 1978 the people of Hawaii amended the Hawaii Constitution to create an Office of Hawaiian Affairs (OHA) whose mission was to better the conditions of Native Hawaiians and native Hawaiians."

As specified in the Complaint, ¶32 (Cross-Pet. App. 90) which must be accepted as true for purposes of standing and, in any event, is based on official election results, the 1978 votes were not tallied legally; 18,833 voters were disenfranchised; and it is doubtful that the required majority of the voters ratified the OHA amendments. (The time for election contests has long-passed, but it is nevertheless inaccurate to claim that the OHA amendments were adopted by the people of Hawaii.)

E. HHCA and the OHA laws deny to respondents absolutely and on exclusively racial grounds, the opportunity to seek and obtain valuable economic and educational benefits available through those agencies. They are able and ready to apply if the state should cease using the racial classification.

The petition asserts at page 5 that plaintiffs did not allege that any of them applied for, or otherwise sought, or were even interested in, participating in these programs; at page 10, that they do not allege that they even desire, much less seek, any of the benefits; and again at page 19, that they don't seek the benefits.

First, this Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) instructs that "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim'").

Second, the HHCA and the OHA laws deny plaintiffs the opportunity to apply and compete for benefits on an equal basis. The racial barrier is manifest on the face of the statute and it denies to them absolutely, without any room for waiver or individualized decision-making by state officials, the equal protection of the laws and causes each of them an injury in fact.

Moreover, regardless of the fact that they have not actually applied for particular programs, each of them is "able and ready" to apply for benefits should the State cease to use race, i.e., excluding anyone who is not "native Hawaiian" or "Hawaiian". See, for example, the

Declaration of Donna Malia Scaff dated December 3, 2003 filed in the trial court with docket 326. (Respondent App. 1, *infra*.)

See also *Gratz v. Bollinger*, 123 S.Ct. 2411, 2423 (2003) "Hamacher demonstrated that he was 'able and ready' to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions."

REASONS FOR OPPOSING CERTIORARI ONLY FOR THE ONE "STANDING" ISSUE

Further delays now would be particularly unfair to respondents who, as plaintiffs, endured 22 months of delays in the trial court. During all those months, plaintiffs were prevented from moving for, and being heard on, summary judgment on the merits while the trial court: considered and reconsidered standing issues raised by defendants; considered and reconsidered bifurcation issues raised by defendants; set a protracted hearing schedule over plaintiffs' objection; then, after exhaustive briefing, *sua sponte* continued the first round hearing over plaintiffs' objection; then *sua sponte* continued it again over plaintiffs' objection, this time ordering that the first round motions were "deemed withdrawn without prejudice subject to being refiled"; let the United States out, then brought it back in, then let it out again; struck plaintiffs' motion for partial summary judgment; and declined to issue an appealable standing order. Finally, 22 months after the suit was filed, the trial court granted the motion to dismiss on "political question" grounds, substantially

the same motion the court had denied only 2 months and 4 days after the case was filed. (This is spelled out in itemized detail in Appellants' Opening Brief filed in the Ninth Circuit June 7, 2004, at 55-66, "V. TWENTY TWO MONTHS OF DELAY.")

Piecemeal review of just the one "standing" issue raised by the petitioner would not only add further delay to this already unconscionably-delayed case, but might even foreclose indefinitely the practical ability of anyone in Hawaii to end the existing regime of invidious discrimination by the Hawaii state government and its officials.

Justice in this case has been denied for 4 years. Respondents pray that this Court will take charge, grant a writ of certiorari to both the petitioner and the respondents/cross-petitioners; resolve all the standing questions; and allow this important case to move forward to judgment on the merits.

REASONS FOR NOT "HOLDING" THE PETITION(S)

Daimler-Chrysler v. Cuno, Nos. 04-1407 and 04-1724, was argued before this Court March 1, 2006 and may be decided in the ordinary course within the time frame that this Court will decide whether to grant certiorari in this case.

It is conceivable that the decision there could provide some guidance here. For example, if this Court upholds Ms. Cuno's standing as a state taxpayer, it would indicate that respondents' state taxpayer standing should, even more so, be upheld and without the narrow restriction.

But, contrary to the argument of petitioner, dismissal of *Cuno* for lack of jurisdiction would not dispose of this case. As discussed earlier, respondents allege not a grievance shared by all state taxpayers, but the genuine pocketbook injury each of them suffers because she or he is singled out for exclusion from the benefits of her or his taxes solely because of her or his race.

Finally, and perhaps most important of all, respondents present a claim as trust beneficiaries and Ms. Cuno does not. The trust beneficiary claim is the major focus of respondents' conditional cross-petition for certiorari. The dismissal of the trust claim for lack of standing has repercussions not only for Hawaii's management of its 1.4 million acre ceded lands trust but for public trusts, charitable trusts and even private trusts across the United States and, perhaps throughout the world. The trial court's casual disregard of a trustee's duty of impartiality and duty not to comply with illegal trust terms, radically reduces the protection of beneficiaries basic to the law of trusts. The "heads-trustees-win, tails-beneficiaries-lose" reasoning by the court of appeals (Beneficiaries cannot sue the U.S. because it is not named as co-trustee; but since the U.S. retains power over the operation of the trust, it is an indispensable party; so the beneficiaries cannot sue the present trustee either. See Conditional Cross-Petition at 22.) is breathtaking in its rejection of the foundation of trust law, the trustee's duty of strict loyalty to the beneficiary. The existing decision in this case that trust beneficiaries *cannot even come into court* to seek equitable relief where the trustee blatantly violates its fiduciary duty, undermines trusts everywhere. This is a decision that justifies this Court's review, and soon.

CONCLUSION

The Court should grant both the petition and conditional cross-petition for writs of certiorari.

Respectfully submitted,

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March 7, 2006

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Declaration of Plaintiff Donna Malia Scaff filed December 3, 2003 in the District Court with Docket 326 ..... App. 1

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

EARL F. ARAKAKI, et al.,	) CIVIL NO. 02-00139 SOM/KSC
Plaintiffs	) DECLARATION OF PLAINTIFF DONNA MALIA SCAFF
v.	) IN RESPONSE TO ORDER
LINDA LINGLE, et al.,	) TO SHOW CAUSE DATED
Defendants.	) NOVEMBER 24, 2003

DECLARATION OF PLAINTIFF DONNA MALIA SCAFF IN RESPONSE TO ORDER TO SHOW CAUSE DATED NOVEMBER 21, 2003

1. I am a citizen, resident, inhabitant, registered voter, and taxpayer of the State of Hawai'i and of the United States and I am over the age of 18.

2. I am an American of Hawaiian ancestry (37.5%) and Chinese, German and Okinawan ancestry (62.5%). I was born and raised on Molokai and have lived in Hawaii all my life.

3. In this declaration, I use the term "Hawaiian" as it is defined in HRS § 10-2: any descendant of the people inhabiting the Hawaiian Islands in 1778. Under that definition, I am a "Hawaiian." I also use the term "native Hawaiian" as it is defined in HRS § 10-2 and the Hawaiian Homes Commission Act: any descendant of not less than one half part of the races inhabiting the Hawaiian Islands previous to 1778. Under that definition, I am not a "native Hawaiian."

4. **Appropriations for OHA for "native Hawaiians" harm me as a taxpayer.** Part of the State of Hawaii's tax revenues (including taxes I pay to the State of Hawaii) are appropriated to the Office of Hawaiian Affairs (OHA) for native Hawaiians and part also goes to pay principal and interest on bonds that generated funds that have been appropriated to OHA for native Hawaiians and part also goes to finance appropriations to OHA as a pro rata portion of funds derived from the public land trust for the betterment of conditions of native Hawaiians. The OHA laws require the OHA trustees to use funds appropriated for the betterment of conditions of native Hawaiians solely for the benefit of the racial class of native Hawaiians. If the State tax revenues (including taxes I pay) were not diverted to OHA for native Hawaiians, my taxes could be reduced or funding for programs that I could qualify for could be increased. Although my tax burden is increased by the appropriations to OHA for native Hawaiians and the appropriations to pay principal and interest on bonds that generated funds that have been appropriated to OHA for native Hawaiians, I am denied any benefit of those appropriations solely because of my ancestry, i.e., I do not have the required one-half part of the favored racial ancestry. I am injured in that I am denied the equal protection of the laws and I am forced to pay taxes for unconstitutional racially discriminatory programs which exclude me as a beneficiary.

5. **Appropriations to or for OHA for "native Hawaiians", and OHA's retention and use of public funds only for "native Hawaiians", also injure me as a citizen.** The OHA laws deny me the opportunity to apply and compete for benefits from the funds held by OHA for native Hawaiians on an equal basis. The imposition of this

racial barrier denies to me the equal protection of the laws and causes me an injury in fact. I am "able and ready" to apply for benefits from those funds should the State or OHA cease to use race, i.e., excluding anyone who is not "native Hawaiian", with respect to the use of those funds.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of December, 2003, Honolulu, Hawaii.

/s/ Donna Malia Scaff
DONNA MALIA SCAFF

(2)

No. 05-988

In The

Supreme Court of the United States

LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAII,

Petitioner,

v.

EARL F. ARAKAKI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Plaintiffs-Respondents' opposition simply confirms the appropriateness of granting Petitioner Governor Lingle's certiorari petition.

First, the opposition brief explicitly concedes that Governor Lingle's certiorari petition should be granted. *See* Brief in Opposition at 1 ("Respondents . . . do not oppose, indeed they welcome, this Court's review of *all* the 'standing' issues in this case"); *id.* at 3 ("respondents welcome this Court's review"); *id.* at 8 ("Respondents pray that this Court . . . grant a writ of certiorari to . . . the petitioner"); *id.* at 10 ("The Court should grant . . . the petition[s] . . . for writs of certiorari.").

Second, Plaintiffs-Respondents do not even attempt to contest the grounds for certiorari demonstrated by the Governor in her petition. For example, they do *not* dispute the importance of the issue of federal courts allowing standing to plaintiffs who have alleged no direct injury, and who rely solely upon their status as state taxpayers to get into federal court. They do *not* deny that such suits result in federal courts resolving abstract questions for parties with no real injury, needlessly interfere with state governmental operations, undermine federalism and separation of powers, and waste scarce judicial resources. Nor does the opposition refute that the issue should be decided by this Supreme Court. Indeed, as noted in the prior paragraph, they *ask* this Court to decide the issue.

Furthermore, and significantly, the opposition does not and cannot dispute the direct conflict between the Ninth Circuit's decision below and the decisions of five other circuits clearly rejecting general state taxpayer standing.

Third, Plaintiffs-Respondents put forth no serious argument to refute Governor Lingle's claim that the Ninth Circuit's ruling granting state taxpayer standing was erroneous. Their only attempt at opposition is the following:

> The petition casts the "question presented" as whether state taxpayers have standing "simply because they pay taxes to the state."
>
> Respondents never made such a claim. Rather, their complaint, as taxpayers, is that the state does not treat all taxpayers equally: It singles out respondents and other taxpayers similarly situated and denies them the benefit of the part of their taxes used exclusively for those of the favored racial ancestry.

Brief in Opposition at 1-2. Of course, this assertion is patently frivolous. Both the District Court and the Ninth Circuit upheld plaintiffs' standing simply because plaintiffs were state taxpayers, provided, of course, that the challenged programs used state taxpayer monies, and those taxpayer monies would not be used if the programs were successfully enjoined. *See* District Court Orders in Appendix to Petition ("App.") 153-55; App. 118-120, 122 (*see also* App. 84-85); *Arakaki v. Lingle*, 423 F.3d 954, 967-69 (9th Cir. 2005) (App. 21-24).

Realizing the vulnerability of the Ninth Circuit's state taxpayer standing doctrine – which conflicts with every other Circuit that has reached the issue squarely, and with this Court's *ASARCO* opinion by Justice Kennedy (joined by Justices Stevens and Scalia, and the late Chief Justice Rehnquist), and Justice Breyer's *Nike* opinion (joined by former Justice O'Connor) – the opposition cavalierly attempts to change the question into a *non*-"state taxpayer

standing" issue. The opposition now asserts that their real injury is *not* that their tax dollars are being spent on an allegedly unconstitutional program, which, if enjoined, would save them tax dollars, but rather that they are "not treat[ed] . . . equally" as taxpayers. Brief in Opposition at 2. But any differential treatment would stem only from the fact that some of the challenged state taxpayer funded OHA programs limit participation to Native Hawaiians. Yet, as noted in Governor Lingle's petition, and which the opposition does not seriously dispute:

> *Plaintiffs, however, did not allege that any of them applied for, otherwise sought, or were even interested in, participation in those programs.*

Petition at 5. Because Plaintiffs-Respondents never asserted any interest in participating in OHA programs limited to Native Hawaiians, plaintiffs plainly were *not* denied equal treatment (whether as individuals, as taxpayers, or in any other capacity). *See Allen v. Wright*, 468 U.S. 737, 755 (1984) (Allegations of governmental racial discrimination are insufficient to confer standing where "the plaintiffs were not personally subject to the challenged discrimination.").

Plaintiffs have simply failed to allege or demonstrate that *they personally* were victimized by any Native Hawaiian qualifications imposed by OHA – which is not surprising because they have all along rested their claim to federal court jurisdiction on their state *taxpayer* status. Accordingly, if their state taxpayer status is insufficient to generate standing, plaintiffs are left complaining of nothing more than the psychological stress of believing that their government is not acting constitutionally. That type of distress, of course, is plainly insufficient to establish Article III standing. *See Lujan v. Defenders of Wildlife*,

504 U.S. 555, 573-74 (1992) ("We have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.").[1]

---

[1] In a desperate attempt to now generate a *non*-"state taxpayer" basis for standing, Plaintiffs-Respondents point to a lone belated declaration of a single plaintiff, Donna Malia Scaff, who fails to identify even one OHA program in which she would like to participate. Her declaration simply makes the wholly conclusory assertion that she is "'able and ready' to apply for benefits" from a pool of OHA funds that are used for various different programs, without identifying in even the most general way which particular program(s) she is interested in. This is not surprising as Scaff, as far as the record discloses, likely has no personal desire to participate in any OHA program, and is simply a person who, like the other plaintiffs, has an ideological objection to OHA's limiting some of its programs to Native Hawaiians. Her declaration makes the generalized nature of her grievance very clear:

> 5. Appropriations to or for OHA for "native Hawaiians", and OHA's retention and use of public funds only for "native Hawaiians", also injure me as a citizen. The OHA laws deny me the opportunity to apply and compete for benefits from the funds held by OHA for native Hawaiians on an equal basis. The imposition of this racial barrier denies to me the equal protection of the laws and causes me an injury in fact. I am "able and ready" to apply for benefits from those funds should the State or OHA cease to use race, i.e., excluding anyone who is not "native Hawaiian", with respect to the use of those funds.

Declaration of Scaff (Brief in Opposition at App. 2-3). While Scaff attempts to fabricate a personal stake by simply *asserting* in the last sentence that she is "ready" to apply for OHA benefits, her failure to identify any particular OHA program or benefit she seeks reveals the illusory nature of her interest. OHA, of course, has many different programs (3/7/02 Affidavit of Clyde W. Namu'o at ¶6), yet Scaff does not assert an interest in any *particular* program or programs. Moreover, this Court requires that one not merely *assert* that one is "able and

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ready" to apply, but actually "*demonstrate*" that one is able and ready. *See Gratz v. Bollinger*, 539 U.S. 244, 262 (2003); *Northeastern Florida Chapter v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *see also Adarand Constructors v. Pena*, 515 U.S. 200, 211-12 (1995) (requiring plaintiff to make "an *adequate showing* that sometime in the relatively near future it will bid on another Government contract").

That a plaintiff's general and vague assertion that she is "ready to apply" for benefits – without identifying what particular benefits (among many possible options) she seeks – is insufficient to confer Article III standing is confirmed by this Court's ruling in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990) (emphasis added), which held that:

> In ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the nonmoving party" only in the sense that, where the facts *specifically* averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that *general* averments embrace the "*specific* facts" needed to sustain the complaint. As set forth above, Rule 56(e) provides that judgment "shall be entered" against the nonmoving party unless affidavits or other evidence "set forth *specific* facts showing that there is a genuine issue for trial." *The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.* Rather, . . . as to a *specific* fact essential to the other side's case[, a party may] demand at least one sworn averment of that fact before . . . lengthy . . . litigation continues.
>
> . . . It will not do to "presume" the missing facts because without them the affidavits would not establish the injury that they generally allege. That converts the operation of Rule 56 to a circular promenade . . . .

Scaff's declaration is precisely the sort of *general* allegation this Court in *National Wildlife Federation* deemed insufficient to satisfy Rule 56's demand for *specific* facts. By merely averring in vague and conclusory terms a readiness to apply for some *unspecified* OHA benefits at some *unspecified* time, Scaff's declaration falls way short of meeting this standard. As this Court stated in the *other Lujan* case, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (first emphasis added), "[s]uch 'some day' intentions – without any *description of concrete plans*, or indeed even any specification of *when* the some day

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will be – do not support a finding of the 'actual or imminent' injury that our cases require."

Plaintiffs try to avoid the "specific facts" standard by citing the portion of *Defenders of Wildlife*, 504 U.S. at 561, which states that "[a]t the *pleading* stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" Plaintiffs' argument is misplaced because we are dealing here with the equivalent of a Rule 56 motion (governed by the "specific facts" standard), not a pleadings-only-based ordinary motion to dismiss (governed by the "general allegations" standard). This is so for two reasons.

First, plaintiffs, by urging this Court to consider the Scaff declaration, are necessarily converting the matter into a summary judgment determination under Rule 56. *See* Fed. R. Civ. Proc. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, *matters outside the pleading are presented to and not excluded by the court*, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ."). Thus, the "general allegations" standard is inapplicable; the Rule 56 standard requiring *specific* facts is the operative one.

Second, because the matter at issue is the *subject matter jurisdiction* of the federal courts to even hear the case, motions to dismiss for lack of subject matter jurisdiction automatically require the plaintiffs to present *evidence* to support their allegations of injury; plaintiffs cannot simply stand upon the raw allegations of their complaint. *See St. Clair v. City of Chico*, 880 F.2d 199, 201 (1989) ("challenges to a court's subject matter jurisdiction . . . are treated as brought under Rule 12(b)(1) even if improperly identified by the moving party as brought under rule 12(b)(6). Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court. *It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.*"). Accordingly, because plaintiffs must present *evidence* to defeat a motion to dismiss based upon lack of injury and thus standing, we are necessarily brought under the "specific facts" standard, which requires *specific* averments.

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As already explained above, Scaff's declaration merely asserting a readiness to apply for *unspecified* OHA benefits at an *unspecified* time seriously fails this "specific facts" standard.

Moreover, even if this Court, contrary to the above, were to treat this matter as being resolved on the *pleadings alone* and *not* as a Rule 56 matter, such that the "general allegations" standard applied – where general allegations are presumed to embrace the necessary specific facts to support the claim – plaintiffs' ***complaint*** does *not* even make any *general* allegations that any of the plaintiffs, including Scaff, desire to participate in OHA's programs. *See* Complaint, paragraph 9 [Cross-Pet. App. 82] (alleging only that each plaintiff "has a material financial interest in the subject matter of this action as a *taxpaying citizen* of the State of Hawaii and the United States"). Paragraphs 62.b and 58.d [Cross-Pet. App. 104, 101-02], cited by plaintiffs in their Brief in Opposition at 3, fail to allege any desire to participate in OHA programs. (¶ 58.d is also irrelevant, as it deals with plaintiffs' *HHCA / DHHL* claims, which were dismissed.).

Furthermore, Scaff's vague and conclusory assertion of interest is even more inadequate because she fails to aver that she participated *in the past* in a particular OHA program. *Cf., e.g., Adarand*, 515 U.S. at 211-12 (granting subcontractor standing because its general manager stated in deposition that the company "bids on every guardrail project in [the state]"). Although a demonstrated history (or even a single prior example) of participation in the subject program may not be a prerequisite to standing in every case, where Scaff makes only the most general and vague assertion of an interest in OHA programs, and cannot even identify the particular OHA program she desires to participate in, the absence of any prior participation underscores and heightens the speculative nature of her conclusory averment.

Finally, even if Scaff had asserted an interest in a *particular* OHA program, because she did not demonstrate that she met the bare minimum requirements for participation in that program (excluding, of course, any Native Hawaiian qualification), she does not have standing. For if she does not meet the minimum requirements, the challenged Native Hawaiian qualification is irrelevant, and a ruling striking that qualification would provide her with no redress. *Cf. Carroll v. Nakatani*, 342 F.3d 934, 942-43 (9th Cir. 2003) (Plaintiff lacked standing to challenge loan's Native Hawaiian qualification because his failure to meet the other minimum requirements for obtaining the loan meant that "[e]ven assuming [plaintiff] had a legitimate intention to apply for a loan, he [failed] to demonstrate that he is in a position to compete" for

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Plaintiffs-Respondents improperly discuss the underlying Equal Protection claim in this case, even though the only issue raised by the Governor's certiorari petition is one of taxpayer *standing*. That discussion, therefore, besides being misleading, is entirely irrelevant.

Finally, Plaintiffs-Respondents improperly discuss *their cross*-petition, which raises *different* standing issues (e.g., trust beneficiary standing), and is not relevant to whether this Court should grant certiorari on *this* petition (filed by *defendant* Governor Lingle) raising the single straightforward question of general state taxpayer standing. In any event, that cross-petition clearly does *not* warrant review by this Court. It does not even address the

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the loan.). Although a plaintiff need not establish that she would actually receive or be awarded the benefit absent the challenged qualification, *see Northeastern Florida Chapter v. City of Jacksonville*, 508 U.S. 656, 666 (1993), a plaintiff must at least satisfy the other minimum eligibility criteria; otherwise, a ruling on the merits in plaintiff's favor would not redress the injury of not being able "to compete on an equal footing." *Id.* A plaintiff ineligible for other reasons simply cannot "compete" at all *regardless* of the challenged qualification. Indeed, if Article III is to mean anything, being "able and ready" to apply means more than just being ready to submit a physical application form, but necessarily encompasses being *qualified* to compete for the benefit. *See Carroll*, 342 F.3d at 943 ("submission of a meritless application falls short of being 'able and ready' to compete"). For example, a white person *with no education whatsoever* surely does not have standing to challenge a medical school minority quota admissions policy even if that person averred that he or she would submit an application. Likewise, a naked conclusory averment that Scaff is ready and able to apply for a particular OHA benefit were the Native Hawaiian qualification stricken does not generate Article III injury where she does not establish that she meets all other minimum requirements for that particular benefit. (Of course, the precise minimum requirements would depend upon which OHA benefit Scaff sought, and Scaff's failure to identify the *particular* OHA benefit she desires makes identifying those requirements impossible).

Rule 10 criteria for certiorari, as it fails to assert (other than in the most conclusory fashion), much less establish, the *importance* of the particular *standing* issues they raise. Cross-Petitioners' suggestion that the Ninth Circuit's adverse standing rulings preclude all possible judicial review of their underlying Equal Protection challenges is frivolous. Any person actually subjected to, and injured by, the Native Hawaiian qualifications – as opposed to Cross-Petitioners, who are mere undifferentiated state taxpayers or inhabitants of Hawaii – could bring those Equal Protection challenges without any standing problems whatsoever.[3]

CONCLUSION

Because the Ninth Circuit's acceptance of general state taxpayer standing raises fundamentally important questions of Article III and prudential standing, and undermines our federal system, needlessly disrupts state governmental programs, wastes scarce judicial resources, and creates a substantial inter-circuit conflict, Governor Lingle respectfully asks that this Court grant her petition

[3] The cross-petition also fails to assert, let alone establish, any conflict between the Ninth Circuit's rulings on those standing issues and a decision of this Court, other federal circuits, or state courts of last resort. In addition, the cross-petition is, for the most part, virtually impossible to comprehend. *See* Supreme Court Rule 14.4 ("The failure of a petitioner to present with . . . *clarity* whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.").

for certiorari.[3] Even Plaintiffs-Respondents concede Governor Lingle's petition should be granted.

Dated: April 3, 2006.

Respectfully submitted,

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[3] The plaintiffs' cross-petition, however, should be denied.

AMER
RECORDS
AND
BRIEFS

Supreme Court, U.S.
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No. 05-988

In The
Supreme Court of the United States
October Term, 2005

LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAII,
Petitioner,
v.
EARL F. ARAKAKI, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF FLORIDA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, IDAHO, MAINE, MICHIGAN, MISSOURI, MONTANA, NEVADA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VERMONT AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether state taxpayers have standing to challenge the actions of state government or state agencies that expend, or involve the use of, state taxpayer dollars, simply because they pay taxes to the state?

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INTEREST OF *AMICI CURIAE*

The States have a compelling interest in preserving the constitutional and prudential standing limitations on plaintiffs seeking to voice generalized grievances—directed at a State's taxing and spending decisions—that are common to all members of the public or citizens of a State. If citizens of a State were granted standing in federal court to challenge state expenditures without demonstrating a concrete, particularized injury, the ability of the States to govern would be seriously impeded and the integrity of our federal system would be jeopardized. The States must be free to pursue their own legislative initiatives and fiscal policies without being subject to unrestrained federal judicial review. Respect for the States as sovereigns thus dictates that federal courts rigorously police the "particularized injury" requirement in suits initiated by state taxpayers challenging a State's taxing and spending decisions.

The Ninth Circuit's decision created uncertainty in the law with respect to this proposition. The otherwise settled view of the circuits is that, absent a particularized injury, a plaintiff's status as a state taxpayer is ordinarily insufficient to confer federal standing to challenge the actions of a state government. Although the States within the Ninth Circuit have a particularly compelling interest in this case, all States have an interest in restoring certainty to the law in light of the federalism implications of the Ninth Circuit's decision.

Because hundreds of thousands, if not millions of taxpayers share the burden of every State's taxing and spending decisions, those decisions are "essentially a matter of public and not individual concern." *See Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). The States have an interest in ensuring such grievances are addressed, as the Constitution contemplates, by the politically responsive branches of government.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision directly conflicts with precedent in the Second, Sixth, and Tenth Circuits, and has created uncertainty in the law.

In order to satisfy the "irreducible constitutional minimum" for standing in federal court, a plaintiff must show that he has suffered an "injury in fact" that is both concrete and particularized. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). To be "particularized," "the injury must affect the plaintiff in a personal and individual way," *id.* at 560 n.1, as opposed to an undifferentiated, "generalized grievance" that is "common to all members of the public," *United States v. Richardson*, 418 U.S. 166, 176-77 (1974). "Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no broader than required by the precise facts to which the court's ruling would be applied.'" *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-222 (1974)). Accordingly, "a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74.

It is settled law that *federal* taxpayers generally lack standing to challenge Congress's taxing and spending decisions because they lack a sufficiently particularized injury. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923); *see also Flast v. Cohen*, 392 U.S. 83, 102-03 (1968) (holding that federal taxpayer status is insufficient to confer standing unless taxpayer "show[s] that the challenged enactment exceeds specific constitutional limitations upon the exercise of [Congress's taxing

and spending] power"). The Court made clear in *Frothingham* that suits premised on federal taxpayer status are not cognizable in federal court because a taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." 262 U.S. at 487.

In *Doremus v. Board of Education*, 342 U.S. 429 (1952), the Court held that a state taxpayer lacks federal standing to challenge state action unless he has sustained a "direct dollars-and-cents injury" as a result, i.e., unless his claim can be characterized as a "good-faith pocketbook action," *id.* at 434. In so holding, *the Court "reiterate[d] what the Court said of a federal statute [in Frothingham] as equally true when a state Act is assailed*: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, *and not merely that he suffers in some indefinite way in common with people generally.*'" *Id.* (quoting *Frothingham*, 262 U.S. at 488) (emphasis added).

A plurality of this Court confirmed in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), that under *Doremus*, suits premised on state taxpayer status are ordinarily not cognizable in federal courts, *id.* at 613-14; *see also Nike, Inc. v. Kasky*, 539 U.S. 654, 669 (2003) (Breyer, J., dissenting) (commenting that state taxpayers "ordinarily lack federal 'standing'"). According to the plurality, state taxpayers cannot satisfy *Doremus*'s "good-faith pocketbook action" requirement simply by alleging that the existence of the challenged state program or practice results in increased government spending and thereby results in higher taxes. *ASARCO*, 490 U.S. at 614. Given the variables attending state taxing and spending decisions, "[t]he possibility that taxpayers will receive any direct pecuniary relief from [the]

lawsuit is 'remote, fluctuating and uncertain.'" *Id.* (quoting *Frothingham*, 262 U.S. at 487).

In light of *Doremus* and consistent with *ASARCO*, the Second, Sixth, and Tenth Circuits have held that state taxpayers lack standing in federal court to challenge a State's taxing and spending decisions unless they can differentiate some quantifiable injury distinguished from that suffered by other taxpayers. *Board of Educ. v. New York State Teachers Retirement Sys.*, 60 F.3d 106, 110-11 (2d Cir. 1995); *Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402-03 (10th Cir. 1992); *Taub v. Commonwealth of Kentucky*, 842 F.2d 912, 918-19 (6th Cir. 1988); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 943-44 (11th Cir. 2003) (recognizing that "state taxpayers [ordinarily] lack a sufficiently personal interest to challenge laws of general applicability, since their injury is not significantly different from that suffered by taxpayers in general"); *Henderson v. Stalder*, 287 F.3d 374, 379 (5th Cir. 2002) ("[I]n cases in which a state taxpayer challenges the constitutionality of a state law, he 'must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, not merely that he suffered in some indefinite way in common with people generally.'") (quoting *Doremus*, 342 U.S. at 434); *Tarsney v. O'Keefe*, 225 F.3d 929, 938 (8th Cir. 2000) (holding state taxpayers could not state Free Exercise claim absent showing of direct injury). Thus the majority view of the circuits is "that the requirements for federal taxpayer standing announced in *Frothingham* control the issue of state taxpayer standing, at least in those cases where violation of the Establishment Clause is not alleged." *Taub*, 842 F.2d at 918.

Ninth Circuit precedent concerning suits premised on state taxpayer standing is irreconcilable with this otherwise settled body of law. The court held in *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984), that state taxpayer plaintiffs satisfy Article III and *Doremus* standing requirements simply by

"[pleading] with specificity amounts of money appropriated and spent [by the state] for allegedly unlawful purposes," *id.* at 1180.[1] Accordingly, there is no requirement under *Hoohuli* that a taxpayer show either (1) that his alleged injury is redressable by (i.e. that will financially benefit from) a favorable decision; or (2) that his alleged injury is different in any way from that of any other state taxpayer.

Hoohuli has been rejected by decisions of at least the Second, Sixth, and Tenth Circuits.[2] *New York State Teachers Retirement Sys.*, 60 F.3d at 110; *Colorado Taxpayers Union*, 963 F.2d at 1401-03; *Taub*, 842 F.2d at 919. In *Taub*, the Sixth Circuit explained why *Hoohuli*'s elimination of a "direct and palpable injury" requirement cannot possibly be correct. The court observed that *Doremus* had not eliminated the requirement—"in fact, the Court in *Doremus* emphasized it by quoting *Frothingham* concerning direct injury and the requirement that a taxpayer-plaintiff allege more than 'merely

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[1] In *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991), a Ninth Circuit panel relied on *ASARCO* for the proposition that "[t]he same constitutional standing principles [applicable to federal taxpayers] apply to those suing in federal court as state taxpayers," *id.* at 1423. However, a subsequent Ninth Circuit panel explained that *Bell* was merely meant to "empl[y] some sympathy toward Justice Kennedy's views," and "should not be interpreted as altering the law of this circuit on state taxpayer standing." *Cammack v. Waihee*, 932 F.2d 765, 770 n.9 (9th Cir. 1991).

[2] Eighth Circuit precedent is less clear on this point. Although the Eighth Circuit in *Tarsney* relied on *Colorado State Taxpayers Union* and *Taub* in dismissing a Free Exercise claim raised by state taxpayers for their failure to identify a direct injury, *Tarsney*, 225 F.3d at 937-38, *Tarsney* does not acknowledge any conflict with *Hoohuli*, and an earlier Eighth Circuit decision appeared to rely on *Hoohuli* in holding, in an Establishment Clause case, that state taxpayers need not demonstrate an increase in their tax burdens to satisfy *Doremus*. *Minnesota Federation of Teachers v. Randall*, 891 F.2d 1354, 1358 (8th Cir. 1989); *see Tarsney*, 225 F.3d at 942 (Magill, dissenting) (noting vagueness of majority opinion with respect to *Doremus* and resulting vagueness of Eighth Circuit precedent with respect to state taxpayer standing aside from Establishment Clause context).

that he suffers in some indefinite way in common with people generally." *Taub*, 842 F.2d at 919.

Notwithstanding *ASARCO* and the weight of authority from other courts, the Ninth Circuit in this case declined to retreat from *Hoohuli*. Without significant analysis, the court held that, notwithstanding *ASARCO*, "*Hoohuli* remains the law of the circuit until our court, sitting en banc, overrules it, or until the Supreme Court, in a majority opinion, plainly undermines its principles." Pet. App. at 24. The Ninth Circuit's holding that *ASARCO* has no precedential value confirmed the existence of a direct split of authority between the Ninth Circuit on one hand and at least the Second, Sixth, and Tenth Circuits on the other. *See* discussion *supra* n.2. Given the federalism implications of the Ninth Circuit's decision, certiorari is necessary to restore certainty to the law.

II. The Ninth Circuit's evisceration of Article III's particularized injury requirement in cases initiated by state taxpayers dramatically undermines state sovereignty.

The "constitutional commitment to federalism" is "seriously undermine[d]" if the Article III standing requirements can be relaxed to permit a state taxpayer, suing solely as such, to challenge state taxpaying and spending decisions in federal court. *Tarsney*, 225 F.3d at 938; *Colorado Taxpayers Union*, 963 F.2d at 1403; *accord, e.g.*, *Taub*, 842 F.2d at 919 ("[W]hen State taxpayers attack state spending in federal court, [it implicates] the integrity of our government's federalist structure.") (quoting *Hoohuli*, 741 F.2d at 1183 (Wallace, J., dissenting)). Accordingly, "[c]onsiderations of federalism should signal [caution] when a state taxpayer seeks to have a federal court enjoin the appropriation and spending activities of a state government." *Taub*, 842 F.2d at 919.

A State's autonomy in its conduct of fiscal affairs is central to its sovereign status. *See Taub*, 842 F.2d at 919 ("State

sovereignty extends to the total conduct of a state's fiscal affairs."). Thus federalism concerns are implicated any time a state taxpayer seeks to have a federal court enjoin the taxing and spending decisions of a state government. While a state citizen who can allege a special injury as a result of a state's constitutional violations should generally be free to initiate a federal suit, state citizens should not be able to use the federal courts to voice generalized grievances with a State's taxing and spending decisions.

The purposes of the particularized injury requirement—to differentiate the business of courts from the business of the political branches of government, *Lujan*, 504 U.S. at 576, and to ensure that "relief can be framed no broader than required by the precise facts to which the court's ruling would be applied," *Warth*, 422 U.S. at 508 (internal quotation omitted)—have heightened significance in this context. If state taxpayers have federal standing to voice generalized grievances with state taxing and spending decisions, they will have little incentive to raise those concerns before the politically responsive branches of state government. *See Tarsney* 225 F.3d at 938; *cf. Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) ("To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"); Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L.J. 771, 845 (2003) ("[M]any of the state and municipal taxpayer cases suggest [that] taxpayers seek the assistance of federal court judges to decide disputes that include a range of issues that are picayune: university and college class offerings, city contracts and bidding procedures, intramural sport rules and requirements.") (footnotes omitted). The resulting

"[u]nnecessary or abstract decisions . . . could unduly constrict experimental state welfare legislation and undermine local self-determination." *Colorado Taxpayers Union*, 963 F.2d at 1403 (quoting *Hoohuli*, 741 F.2d at 1183 (Wallace, J., dissenting)); *Taub*, 842 F.2d at 919; *see also* Staudt, 52 Emory L.J. at 845 (arguing that particularized injury requirement in state taxpayer standing cases is sensible because, otherwise, "the federal courts begin to play the role of ombudsman for states . . . ").

Accordingly, the federal structure of the Constitution requires the federal courts be more, not less, vigilant in policing Article III's "case or controversy" requirement when a State is hailed into federal court and forced to defend a sovereign interest as sacrosanct as its authority to tax and spend free of federal interference. *Cf. Dawson v. Childs*, 665 F.2d 705, 709 (5th Cir. 1982) ("Under our federalist system, the state governments no less than the federal government possess certain unalienable powers that the other may not encroach upon. . . . Of all such areas, the field of state taxation is perhaps the most important."). "The mere allegation of federal constitutional violations cannot be allowed to clothe a state governmental decisionmaking process with the ill-fitting garments of federal court scrutiny." *Colorado Taxpayers Union*, 963 F.2d at 1403. Instead, respect for the States as sovereigns requires the federal courts, "before permitting a plaintiff to challenge state governmental activity, . . . to ensure, with careful attention, that the parties before it have the requisite concrete adverseness that will ensure full presentation of the issues and avoid unnecessary intrusion into state governmental processes." *O'Sullivan v. City of Chicago*, 396 F.3d at 854 (7th Cir. 2005).

The Article III "particularized injury" requirement precludes taxpayers from "employ[ing] a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *See Flast*, 392 U.S. at 106. The policy rationale underpinning this requirement is at least as strong in this context—where state taxpayers attempt to utilize the federal

courts to air generalized grievances directed at their state government—as it is in an all-federal action. The Ninth Circuit erred in reaching the opposite conclusion.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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